Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 21

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

FILED [illegible], 1963

PROBABLE JURISDICTION NOTED MARCH 9, 1964

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

Equitable Relief Demanded

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed May 17, 1960

Come now the Plaintiffs, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, hereinafter called the "Milwaukee", and the Lake Superior & Ishpeming Railroad Company, a corporation, hereinafter called the "Ishpeming", and for complaint against the United States of America and the Interstate Commerce Commission state and allege:

I.

Jurisdiction

1. The purpose of this suit is to annul and set aside, and to enjoin the enforcement of, the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, both of which were entered in said Commission's Finance Dockets 20048 and 20139, entitled respectively, *Complaint of Duluth, South Shore and Atlantic Railroad Co. in re Construction by Lake Superior & Ishpeming Railroad Co.* and *Application of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake*

Superior & Ishpeming Railroad Company. The said order of Division 4 and the report upon which it is based are annexed hereto as Appendix A, and the said order of the [fol. 2] Interstate Commerce Commission is annexed hereto as Appendix B. All hereby are incorporated herein by reference and made a part hereof.

2. Jurisdiction of this action is conferred on this Court by Title 28 U.S.C., Section 1336, which provides that district courts shall have jurisdiction of civil actions for such purposes, as hereinafter more fully appears.

3. This action is brought pursuant to and in accordance with Title 28 U.S.C., Sections 1398, 2284, 2321, 2322, 2323, 2324 and 2325, and the Administrative Procedure Act, Title 5 U.S.C., Ch. 19, Section 10, as hereinafter more fully appears.

II.

Parties

4. Plaintiff Milwaukee is now, and was at all times herein mentioned, a corporation organized and incorporated under the laws of the State of Wisconsin and engaged in the business of transportation by railroad of persons and property as a common carrier, both in intrastate and interstate commerce, in, between and among the States of Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington and Wisconsin.

5. Plaintiff Ishpeming is now, and was at all times herein mentioned, a corporation organized and incorporated under the laws of the State of Michigan and engaged in the business of transportation by railroad of persons and property as a common carrier, both in intrastate and interstate commerce, within and through the State of Michigan. Its principal office is located in Marquette, Michigan.

[fol. 3] 6. The United States of America is made a Defendant pursuant to Title 28 U.S.C., Section 2322, and its agency, the Interstate Commerce Commission, is joined with it as a Defendant.

III.

The Republic Junction Connection

7. On or about October 21, 1957, Plaintiffs constructed, and commenced operation over, an interchange connection at or near a point known as Republic Junction, Michigan, where Plaintiffs' respective lines of railroad are contiguous and parallel. Said connection comprises a crossover track between the main tracks of Plaintiffs' respective lines. Two parallel interchange sidings were also concurrently constructed and connected to the main track of the Ishpeming. The allegations of this paragraph appear more fully in the map and the photographs attached hereto as Appendices C and D, respectively. Both are hereby incorporated herein by reference and made a part hereof.

8. Said interchange connection is now, and at all times since its establishment has been, used exclusively and solely by Plaintiffs for the interchange switching of carload traffic between their respective lines of railroad. Such interchange is accomplished by switching cars from the trains of one Plaintiff onto and over the said interchange tracks, upon which said cars remain until picked up by the other Plaintiff and incorporated into its trains. No new territory and no new shippers are now, or have ever been, served by said connecting track. Plaintiffs now do not conduct, and have never conducted, any line-haul operations over any of said tracks but only switching movements incidental to the interchanging of cars as aforesaid.

9. Traffic is now, and continuously since the establishment of said switching connection has been, interchanged between Plaintiffs from time to time over and by means [fol. 4] of said switching connection. Such traffic has consisted primarily of saw logs and chemical wood moving from origin points in the State of Michigan to destination points in the State of Michigan, all of which more fully appears from the record in the proceedings before the Interstate Commerce Commission.

10. Plaintiffs have a duty to establish reasonable through routes with other carriers and reasonable facilities for the

operation thereof, which said duty is imposed upon them by statute, to wit, Section 1(4) of the Interstate Commerce Act, which statute is set out in Appendix E hereto and hereby is incorporated herein by reference and made a part hereof.

11. The aforesaid switch connection and interchange switching operations conducted thereover by Plaintiffs at all times since their inception have fulfilled, and will continue in the future to fulfill, Plaintiffs' duty and affirmative obligations with respect to through routes under the said Section 1(4) of the Interstate Commerce Act.

12. Prior to the construction and operation aforesaid, Plaintiffs obtained no authorization therefor from the Interstate Commerce Commission, except that tariffs specifying through routes via Republic Junction were duly filed with said Commission as provided by law.

IV.

Proceedings Before the Interstate Commerce Commission

13. On or about January 3, 1958, the Duluth, South Shore and Atlantic Railroad Company, hereinafter called the "Duluth", petitioned the Interstate Commerce Commission alleging that said interchange tracks constituted an extension of Plaintiffs' respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce [fol. 5] Act and that no certificate of public convenience and necessity had first been obtained pursuant to the requirements of that provision. Said petition requested the Commission to investigate the facts and circumstances of said interchange connection and require Plaintiffs to comply with Sections 1(18) to 1(21) of the Interstate Commerce Act, which said statutes are set out in Appendix F hereto and hereby are incorporated herein by reference and made a part hereof. Plaintiffs answered such petition averring that said interchange switching connection did not constitute an extension of line under Section 1(18) and that said tracks were only switching tracks within the scope of Section 1(22) of the Interstate Commerce Act, which

said statute is set out in Appendix F hereto and hereby is incorporated herein by reference and made a part hereof. Said petition was docketed by the Commission as Finance Docket 20048.

14. Despite their position that a certificate authorizing said connection was not required by the Interstate Commerce Act, Plaintiffs, out of an abundance of caution, on March 27, 1958, filed a joint application under the said Section 1(18) of the Interstate Commerce Act for a certificate authorizing operation over said interchange tracks. In that application Plaintiffs reiterated their said position and stated that accordingly "a petition to dismiss this application is concurrently being filed". Said application was docketed by the Commission as Finance Docket No. 20139 and was supplemented by amendment filed on August 1, 1958 under Section 5(2) of the Interstate Commerce Act by which approval was sought for the joint use of certain tracks of each by the other Plaintiff.

15. In accordance with their said position as stated in their application, Plaintiffs filed with the Commission on [fol. 6] March 27, 1958 a motion to dismiss their application on the ground that said interchange connecting tracks were merely switching tracks which were excepted by the provisions of Section 1(22) from the requirements of Section 1(18). Such motion subsequently was made applicable to the amendment under Section 5(2) on the ground that such joint use of the interchange connecting tracks was likewise excepted from the jurisdiction of the Interstate Commerce Commission.

16. Said matters were consolidated and a hearing thereon was had on September 5, 1958. The recommended report and order of the hearing Examiner found that the Interstate Commerce Commission had jurisdiction of this proceeding in that Plaintiffs' said interchange switching tracks constituted extensions of their respective lines of railroad within the meaning of the said Section 1(18) of the Interstate Commerce Act. Said report further found that public convenience and necessity require the continued maintenance and operation of the interchange tracks by the Plain-

tiffs herein and recommended that the Commission enter an appropriate order and certificate authorizing such continued maintenance and operation.

17. On exceptions and replies thereto by the parties to the proceedings, Division 4 of the Interstate Commerce Commission in its said report and order dated September 25, 1959, found that the said switching tracks constitute extensions of Plaintiffs' respective lines of railroad in violation of the provisions of Sections 1(18) through 1(22) of the Interstate Commerce Act; that Plaintiffs' motion to dismiss the said Section 1(18) application for want of jurisdiction should be overruled; that the present and future public convenience and necessity were not shown to require operation by Plaintiffs of the said connecting and [fol. 7] interchange tracks; and that Plaintiffs' said Section 1(18) application should be denied. Division 4 accordingly ordered Plaintiffs to cease and desist from the maintenance and operation of said connecting and interchange tracks.

18. Plaintiffs petitioned the Interstate Commerce Commission for reconsideration of the said report and order of Division 4. By order dated April 7, 1960, effective April 30, 1960, the Interstate Commerce Commission denied said petition and required Plaintiffs to comply with the said order of Division 4 within 45 days from and after April 30, 1960.

19. The said order of April 7, 1960, has been entered by the entire Interstate Commerce Commission. It is final and effective, and there is no superior agency authority to which Plaintiffs may appeal. Plaintiffs, therefore, have exhausted their administrative remedies, and by the provisions of Section 10(c) of the Administrative Procedure Act, 5 U.S.C., Section 1009(c), the said orders are now entitled to judicial review.

V.

Allegations of Error

20. The aforesaid orders of Division 4 and of the Interstate Commerce Commission, which require Plaintiffs to cease and desist and thereafter abstain from the maintenance and operation of said interchange connecting tracks are outside the jurisdiction and beyond the statutory powers of the Interstate Commerce Commission and are therefore unlawful, in that such orders are predicated upon the following errors of law and fact.

(a) The finding of the Interstate Commerce Commission that said connecting and interchange tracks constitute an extension of Plaintiffs' respective lines of railroad within the meaning of Section 1(18) of [fol. 8] the Interstate Commerce Act is unsupported by evidence of record and is, therefore, erroneous, unreasonable, arbitrary, capricious and constitutes an abuse of discretion.

(b) The Interstate Commerce Commission erred as a matter of law in concluding from the undisputed facts of record that said connection of Plaintiffs' lines of railroad by means of the aforesaid interchange switching tracks constitutes an extension of their respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act.

(c) The Interstate Commerce Commission erred as a matter of law in concluding that said physical connection, composed exclusively of switching and side tracks, is not excluded from the requirements of Sections 1(18)-1(21) and of Section 5 of the Interstate Commerce Act by the provisions of Section 1(18) and 1(22) of the Interstate Commerce Act.

(d) The Interstate Commerce Commission, therefore, erred as a matter of law in concluding that Plaintiffs have constructed and are operating said interchange connecting tracks as extensions of their respective lines of railroad in violation of Sections 1(18)-1(22) of the Interstate Commerce Act.

(e) The Interstate Commerce Commission erred as a matter of law and as a matter of fact in that it failed and refused to grant Plaintiffs' motion to dismiss the application in Finance Docket 20139 for want of juris-
[fol. 9] diction, which failure and refusal was, therefore, arbitrary, capricious, unreasonable and an abuse of discretion.

21. In the event that the jurisdictional questions shall be resolved by this court contrary to the allegations and assignments of error contained in paragraph 20 hereof, then Plaintiffs allege that the Interstate Commerce Commission erred in making its said orders denying their application under Section 1(18) of the Interstate Commerce Act for a certificate of public convenience and necessity and their supplemental application under Section 5 for the Commission's approval and authorization of the joint trackage rights proposal. Such errors lie in the following particulars:

(1) The finding that the present and future public convenience and necessity were not shown to require operation by the Plaintiffs of said connecting and interchange tracks is contrary to the evidence of record, unsupported by substantial evidence, arbitrary and capricious, and affected by the following findings and assumptions of evidentiary facts each of which is without the necessary support in the evidence:

(a) That the lack of a two-line route from Sunrise Landing, Michigan to Iron Mountain, Michigan was of no material concern to the shipper at Iron Mountain when the extension of the Ishpeming's line from Cusino, Michigan to Sunrise Landing was before the Interstate Commerce Commission;

(b) The assumption that the lack of a two-line route from Sunrise Landing to Amasa, Michigan was likewise of no material concern to the shipper [fol. 10] at Amasa at that time;

(c) That the involved shippers are already provided with adequate transportation service;

(d) That the diversion to the route via Republic Junction of the saw log and chemical wood traffic involved would adversely affect the earnings of the lines from which diverted and might well affect their ability to continue to provide adequate service in the area;

(e) That the benefits of the two-line route from Sunrise Landing to these two destinations are outweighed by the detrimental effect of such route upon competing carriers.

(2) The denial of the certificate of public convenience and necessity pursuant to Plaintiffs' application in Finance Docket 20139 was further induced by the Commission's conclusion that it would not be consistent with the provisions of the Interstate Commerce Act to grant a certificate of public convenience and necessity because of the relationship to and control of the Ishpeming by Cleveland Cliffs Iron Company. Such conclusion is arbitrary, capricious, not supported by the evidence of record, and the denial of a certificate by reason thereof is beyond the statutory powers of the Interstate Commerce Commission.

(3) The denial of the certificate of public convenience and necessity pursuant to Plaintiffs' applica- [fol. 11] tion in Finance Docket 20139 was still further induced by the Interstate Commerce Commission's failure to recognize that Plaintiffs' construction of, and operations over, the involved connecting tracks constituted fulfillment of, and compliance with, the duty imposed upon Plaintiffs by Section 1(4) of the Interstate Commerce Act.

(4) By reason of the aforesaid errors the conclusion of the Interstate Commerce Commission that the Section 1(18) application in Finance Docket 20139 should be denied and the supplemental Section 5 application therein dismissed is unreasonable, arbitrary, capricious, and beyond the statutory powers of the Commission; and the order denying and dismissing said applications for such reason is unlawful.

(5) For the same reasons, the order requiring Plaintiffs to cease and desist and thereafter abstain from the maintenance and operation of the said connecting and interchange tracks is likewise unreasonable, arbitrary, capricious, and beyond the powers of the Interstate Commerce Commission, and therefore unlawful.

VI.

Damages Sustained

22. As a result of the said findings and orders of the Interstate Commerce Commission, Plaintiffs will suffer the following injury, loss and damage:

(a) Plaintiffs in the future will be unable to maintain and operate over said connection and will be unable to interchange carload traffic between their [fol. 12] respective lines as aforesaid;

(b) Plaintiffs in the future will be deprived of a substantial portion of such traffic as now moves, and heretofore has moved, over said connection in that such traffic in the future will move by other carriers or by a different mode of transportation, to wit, motor truck and not rail transportation;

(c) Plaintiffs in the future will be deprived of the revenues from such traffic;

(d) Plaintiffs in the future will be prohibited from complying with an affirmative duty imposed upon them by the Interstate Commerce Act, to wit, the duty to establish through routes with each other pursuant to Section 1(4) of the Interstate Commerce Act.

23. Such damage is irreparable and there is no adequate remedy at law for the redress thereof.

Wherefore, Plaintiffs respectfully pray:

(a) That process may issue against the Defendants United States of America and the Interstate Commerce Commission in the manner provided by law;

(b) That, pursuant to the provisions of Title 28 U.S.C., Section 2284, the Judge of this Court to whom this complaint is presented, shall notify the Chief Judge of this circuit of the filing of this complaint, and that the Chief Judge thereupon shall designate three judges, at least one of whom shall be a circuit [fol. 13] judge, to hear and decide this suit;

(c) That the Three-Judge Court convened as aforesaid, in order to preserve the status quo now and heretofore existing, shall issue herein, after due notice of the motion therefor, a preliminary injunction restraining and suspending the operation of said orders and enjoining the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, from enforcing said orders pending the filing of an answer, the hearing and the other proceedings to be had herein and until the final determination of this cause of action and of all matters subsidiary or ancillary thereto;

(d) That this Court, or the Judge to whom this complaint is presented, in order to preserve the status quo now and heretofore existing, shall issue, after motion therefor, a temporary restraining order, restraining and suspending the operation of said orders and enjoining the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, from enforcing the said order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the said order of said Commission dated April 7, 1960, pending the hearing and determination of Plaintiffs' motion for a preliminary injunction in [fol. 14] this cause shall have been heard and determined;

(e) That the Three-Judge Court convened as aforesaid, upon final hearing of this cause, shall enter a decree annulling and setting aside the said orders of the Interstate Commerce Commission and permanently

enjoining the enforcement thereof by the United States of America and the Interstate Commerce Commission, and each of them;

(f) That this Court enter its temporary restraining order and preliminary injunction herein requested without requiring Plaintiffs to furnish bond or other security;

(g) That Plaintiffs be granted a reasonable period of time in which to present to this Court a certified transcript of the evidence and proceedings before the Interstate Commerce Commission in its Finance Dockets 20048 and 20139;

(h) That the Court enter such further orders and grant such other relief as may be deemed necessary or proper in the premises.

Respectfully submitted:

Frank M. Long;

Bernard H. Davidson, Peninsula Bank Building, Ishpeming, Michigan;

[fol. 15]

Philip H. Porter, 708 First National Bank Bldg., Madison 3, Wisconsin,

Attorneys for the Lake Superior and Ishpeming Railroad Company.

R. K. Merrill, J. J. Nagle, F. M. Long, 888 Union Station Building, Chicago 6, Illinois, Attorneys for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Rodger S. Trump, 225 E. Mason Street, The Mason Building, Milwaukee 2, Wisconsin, Attorney for Plaintiffs.

[fol. 16] *Duly sworn to by R. K. Merrill and Philip H. Porter, jurat omitted in printing.*

[fol. 17] Clerk's Note:

APPENDIX A TO COMPLAINT

"Report and Order of Division 4 of the Interstate Commerce Commission, dated September 25, 1959" is omitted from the record here. It appears at page 292.

[fol. 35] Clerk's Note:

APPENDIX B TO COMPLAINT

"Order of the Interstate Commerce Commission, dated April 7, 1960 (Served April 15, 1960)" is omitted from the record here. It appears at page 316.

[fol. 36] Clerk's Note:

APPENDIX C TO COMPLAINT

Map entitled, "C.M.ST.P.R.R. Co.—Plat showing Interchange Tracks with L.S. & I. at Republic Jct., Mich., August 12, 1958" is omitted from the record here. It appears at page 229.

[fol. 37] Clerk's Note:

APPENDIX D TO COMPLAINT

"Photographs of Connecting and Interchange Tracks at Republic Junction, Michigan" are omitted in printing.

[fol. 39] Clerk's Note:

APPENDIX E TO COMPLAINT

"Interstate Commerce Act, Section 1(4), 54 Stat. 900, 49 U.S.C. Section 1(4)" is omitted in printing.

[fol. 40] Clerk's Note:

APPENDIX F TO COMPLAINT

"Interstate Commerce Act, Sections 1(18)-1(22), 41 Stat. 477-478, 49 U.S.C. Sections 1(18)-1(22)" is omitted in printing.

[fol. 42]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington 25, D. C.

SECRETARY'S CERTIFICATE

I, Harold D. McCoy, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Petition of Duluth, South Shore and Atlantic Railroad Company, filed January 8, 1958,

Answer of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, filed February 13, 1958,

Reply of Lake Superior & Ishpeming Railroad Company, filed February 14, 1958,

Petition of Duluth, South Shore and Atlantic Railroad Company, filed March 19, 1958,

Application, filed March 27, 1958,

Motion to Dismiss, filed April 9, 1958,

Petition of Chicago and North Western Railway Company to Intervene, filed May 5, 1958,

Order of the Commission, entered May 19, 1958,

Petition for Leave to Intervene, filed May 21, 1958,

Order of the Commission, entered May 28, 1958,

Return to Questionnaire, filed May 26, 1958,

Supplemental application, filed August 1, 1958,

Notice of the Commission, dated September 2, 1958,

Transcript of the stenographer's notes of hearing held September 5, 1958, at Ishpeming, Michigan, and exhibits 1 to 12, both inclusive, filed at said hearing,

Brief of Chicago and North Western Railway Company, filed October 23, 1958,

Brief of Duluth, South Shore and Atlantic Railroad Company, filed October 27, 1958,

Brief of Defendants and Applicants, filed October 24, 1958,

Report Proposed by John L. Bradford, Hearing Examiner, served December 18, 1958,

[fol. 43] Exceptions of Chicago and North Western Railway Company, filed February 9, 1959,

Exceptions and Brief of Duluth, South Shore and Atlantic Railroad Company, filed February 11, 1959,

Exceptions of Lake Superior & Ishpeming Railroad Company, filed February 12, 1959,

Exceptions of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, filed February 11, 1959,

Reply of Lake Superior & Ishpeming Railroad Company, filed March 2, 1959,

Reply of Duluth, South Shore and Atlantic Railroad Company, filed March 3, 1959,

Reply of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, filed March 3, 1959,

Report and order of the Commission, filed and entered September 25, 1959,

Petition of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company, filed December 9, 1959,

Reply of Chicago and North Western Railway Company and Duluth, South Shore and Atlantic Railroad Company, filed December 28, 1959, and

Order of the Commission, entered April 7, 1960,

in Finance Docket No. 20048, Duluth, South Shore & Atlantic Railroad Company v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al., and Finance Docket No. 20139, Chicago, Milwaukee, St. Paul & Pacific Railroad

Company, et al. Operations, etc., the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 26th day of May, A. D. 1960.

Harold D. McCoy, Secretary of the Interstate Commerce Commission.

(Seal)

[fol. 44] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20048

In the matter of the Complaint filed by the Duluth, South Shore and Atlantic Railroad Company concerning the unauthorized extension of the lines of railroad of the Lake Superior & Ishpeming Railroad Company to a connection with the lines of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company near Republic, Michigan.

PETITION—Filed January 8, 1958

Duluth, South Shore and Atlantic Railroad Company, petitioner herein, respectfully shows that:

I

Duluth, South Shore and Atlantic Railroad Company, hereinafter called DSS&A, is a common carrier by railroad engaged in the transportation of property in railroad freight service between Duluth, Minnesota, Sault Ste. Marie, Michigan, and St. Ignace, Michigan, and various other points in the States of Michigan and Wisconsin and as such is subject to Part I of the provisions of the Interstate Commerce Act.

II

Lake Superior & Ishpeming Railroad Company, hereinafter called LS&I, is a common carrier by railroad engaged in the transportation of freight in interstate commerce between Republic Mine, Michigan, and Marquette, Michigan, and various other points within the State of Michigan and [fol. 45] as such is subject to Part I of the provisions of the Interstate Commerce Act.

III

Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter called Milwaukee, is a common carrier by railroad engaged in the transportation of freight in interstate commerce between points in various states of the United States, and in particular over a line of railroad terminating at Champion, Michigan, and as such common carrier is subject to Part I of the provisions of the Interstate Commerce Act.

IV

In 1948 and 1949, LS&I constructed an extension of its lines of railroad to Republic Mine, Michigan, pursuant to a certificate of public convenience and necessity granted by the Interstate Commerce Commission on September 8, 1948 in finance docket No. 16129. In making application for said certificate of public convenience and necessity, said LS&I represented in its return to questionnaire that it would not make any physical connections from the proposed extension with any other railroad, Said representation was incorporated in the report of the Commission in finance docket No. 16129.

V

During 1957, at dates unknown to the DSS&A, the LS&I constructed an extension of its lines near Republic, Michi- [fol. 46] gan, to a point of connection with the lines of the Milwaukee for the purpose of establishing an interchange facility with the Milwaukee and for no other purpose. The LS&I also constructed side tracks approximately 1700 feet in length and 1950 feet in length respectively for the pur-

pose of facilitating interchange of freight cars between the two companies. DSS&A estimates that the cost of construction of all the trackage involved is approximately $35,000.00 on a basis of the present reasonable value of the rail, other track materials and ties used, and amounts of grading and ballasting involved in the construction of the interchange trackage.

VI

LS&I and Milwaukee published certain tariffs effective October 21, 1957, providing for joint rates through the junction thus established by the LS&I and thereafter both companies commenced moving loaded freight cars in interchange and have continued to interchange cars at said junction point in interstate commerce.

VII

DSS&A makes connection with and has interchange facilities with the Milwaukee at Champion, Michigan, a station on the lines of the Milwaukee approximately eight miles north of the interchange junction established near Republic, Michigan. DSS&A and Milwaukee have published and continue to publish tariffs providing joint rates for the through movement of cars to and from stations on the lines of the [fol. 47] Milwaukee and its connections from and to stations on the line of the DSS&A and its connections including the LS&I. Certain of these stations on the DSS&A are also stations on the lines of the LS&I. During the year ended October 31, 1957, DSS&A handled jointly with the Milwaukee through the Champion interchange, 682 cars of revenue freight originating at or destined for stations on the line of the DSS&A which are also stations on the line of the LS&I. During the same period, the DSS&A handled in interchange with the Milwaukee at Champion, 56 cars of revenue freight originating at or destined for stations on the line of the LS&I in which movement the DSS&A participated as an intermediate carrier. A large proportion of the freight interchanged by the DSS&A with the Milwaukee at Champion to and from these stations is susceptible of diversion from the DSS&A to the LS&I as a result of the

connection established by the LS&I and the Milwaukee near Republic, Michigan, and the establishment of tariffs providing for through rates via said connection.

VIII

On November 22, 1957, DSS&A directed an inquiry to the Interstate Commerce Commission to determine whether the extension of the line of the LS&I near Republic, Michigan to a point of connection with the lines of the Milwaukee had been authorized by the commission. On December 6, 1957 the commission advised the DSS&A that no such authority has been granted or petitioned for.

[fol. 48]

IX

On December 6, 1957, the Interstate Commerce Commission advised the LS&I that it had been informed that the railroad had recently extended its line in or near Republic, Michigan, had filed tariffs providing for the interchange between the LS&I and Milwaukee at Republic Junction, Michigan, and that no application for construction of the extension had been filed. On December 16, 1957 the LS&I by and through its attorney advised that if the LS&I found a certificate of public convenience and necessity were required, the LS&I would file application for the same promptly. To date no such application has been filed.

X

Prior to the construction of the extension at Republic Junction, Michigan, the LS&I and Milwaukee had no facilities for the interchange of freight between the two railroads. As a result of the construction of the extension and the publication of tariffs providing for the interchange of freight via Republic Junction, Michigan, the LS&I and Milwaukee hold themselves out to the shipping public as being ready, willing and able to accept shipments routed via Republic Junction, Michigan to and from stations at which the DSS&A furnishes freight service in conjunction with the Milwaukee through interchange at Champion, Michigan. The purpose and effect of the extension are to

permit the LS&I and Milwaukee to operate over it for the through transportation over the lines of railroad of these [fol. 49] companies of interstate freight to and from stations on the lines of the LS&I including those stations which are also stations on the line of the DSS&A from and to stations on the lines of the Milwaukee and its connections, thereby extending the services of the LS&I and the Milwaukee into territories heretofore and presently adequately served by the DSS&A through its connection with the Milwaukee at Champion, Michigan.

XI

The extension of the LS&I in cooperation with the Milwaukee at Republic Junction, Michigan, constitutes an extension of line of railroad of said companies within the meaning of Section 1(18) through 1(21) of the Interstate Commerce Act requiring the issuance of a certificate of public convenience and necessity.

XII

Both the Interstate Commerce Commission and the shipping public generally have an interest in continued compliance with the Interstate Commerce Act by railroads which are subject to the provisions of said Act. In addition, the commission has a special interest in compliance on the part of steam railroads subject to its jurisdiction with representations made under oath concerning the extent of authority petitioned for where the grant of a certificate of public convenience and necessity was based on said representations.

[fol. 50] Wherefore, Duluth, South Shore and Atlantic Railroad Company petitions Interstate Commerce Commission pursuant to the provisions of Section 13 of the Interstate Commerce Act to exercise its duty to investigate the construction of an extension of the lines of railroad of the Lake Superior & Ishpeming Railroad Company to establish a connection with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Republic Junction, Michigan, to require said railroad companies to comply with the provisions

of Section 1(18) through 1(21) of the Interstate Commerce Act and to enforce penalties therein provided for the failure, refusal, and neglect of the carriers involved to comply with the applicable provisions of the statutes; and for such other order or orders as shall be just and proper in the premises.

Respectfully submitted,

Henry S. Mitchell, Thomas M. Beckley, 1734 First National Bank Bldg., Minneapolis 2, Minnesota, Attorneys for petitioner, Duluth, South Shore and Atlantic Railroad Company.

Dated: January 3, 1958.

[fol. 51] Certificate of Service (omitted in printing).

[fol. 52]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20048

In the matter of the Complaint filed by the Duluth, South Shore and Atlantic Railroad Company concerning the unauthorized extension of the lines of railroad of the Lake Superior & Ishpeming Railroad Company to a connection with the lines of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company near Republic, Michigan.

PETITION—Filed March 19, 1958

The answer filed by Chicago, Milwaukee, St. Paul & Pacific Railroad Company (hereinafter called Milwaukee) and the answer denominated a reply filed by Lake Superior & Ishpeming Railroad Company (hereinafter called LS&I) in response to the Notice from the Interstate Commerce Commission dated January 15, 1958, do not in any substantial respect deny the facts set forth in the petition dated January 3, 1958, filed by the Duluth, South Shore and Atlantic Railroad Company (hereinafter called DSS&A) in the above entitled proceeding.

The pleading of respondent, LS&I, incorporates a request that the DSS&A petition be held in abeyance until the filing of the Section 1(18) application by respondents and thereupon dismissed. We take this request to be motion on the part of LS&I and in answer thereto respectfully request the Commission to give consideration to the following points:

[fol. 52a] 1. The LS&I and Milwaukee have established a connection at Republic Junction, Michigan as a result of the construction described in the petition of the DSS&A on file with the Commission in this proceeding, have published tariffs providing for joint rates through the junction thus established, and have interchanged and moved and continue now to interchange and move freight cars over the said connecting trackage.

2. The construction of connecting trackage of the kind and character involved in this proceeding constitutes an extension of line within the meaning of Section 1(18) of the Interstate Commerce Act, requiring the issuance of a Certificate of Public Convenience and Necessity therefor by the Commission prior to the movement of traffic over the extension of line. See *Alabama & Vicksburg Railway Company* vs. *Jackson and Eastern Railway Company* (1926) 271 U. S. 244, *People ex rel New York Central Railroad Co.* vs. *Public Service Commission* (1922) 233 N.Y. 113, 135 N.E. 195, *ElDorado and Western Railway Co.* vs. *Chicago, Rock Island & Pacific Railway Co.* (CCA 8, 1925) 5 F.2d 777, *Charleston & Western Carolina Railway Company Construction* (1930) 166 I.C.C. 707.

3. The LS&I and Milwaukee continue to operate over the extension which has heretofore been constructed without authority of the Commission notwithstanding the complaint filed by petitioner, advice from the Interstate Com- [fol. 53] merce Commission to the LS&I to the effect that the Commission has taken jurisdiction over the construction of connecting or interchange tracks particularly where a new route is being created, and recognition on the part of the respondents that it is desirable to file an application under Section 1(18) of the Interstate Commerce Act for

authority to construct said extension. Continued operating by respondents over the said extension and connecting tracks are in violation of the applicable provisions of the Act.

4. The mere filing of an application for authority to construct the said extension does not in and of itself constitute compliance with the provisions of the Interstate Commerce Act. Respondents continue to be subject to the provisions set forth in Section 1(20) of the Interstate Commerce Act.

5. If the Commission should grant the LS&I's request to disregard our petition that the Commission take appropriate action against the LS&I under Section 13 of the Interstate Commerce Act respecting its unauthorized construction of the extension in question and substitute in its place a belated petition by the LS&I for authority to establish this connection, the Commission would thereby exonerate the LS&I in constructing such a connection without having obtained the Commission's authorization and violating its previous express assurances to the Commission that it would not establish any connection with any other railroad at that point.

[fol. 54] Wherefore, petitioner prays that the request of respondent LS&I for the dismissal of the petition heretofore filed by the DSS&A as moot upon filing of the Section 1(18) application by the respondents be denied and that the Commission retain jurisdiction over the original DSS&A petition, take appropriate action to discharge its duties to investigate the said construction, and obtain such relief from unauthorized construction and enforce such penalties as are in the said Interstate Commerce Act provided.

Dated at Minneapolis, Minnesota, March 13, 1958.

Respectfully submitted,

Thomas M. Beckley, 1734 First National Bank Bldg., Minneapolis 2, Minnesota, Attorney for petitioner, Duluth, South Shore and Atlantic Railroad Company.

Of Counsel: Henry S. Mitchell, 1734 First National Bank Bldg., Minneapolis 2, Minnesota.

[fol. 55] Certificate of Service (omitted in printing).

[fol. 56] [File endorsement omitted]

[fol. 57]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

In the Matter of the Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company under Section 1(18) of the Interstate Commerce Act for a Certificate, if such be necessary, that the Public Convenience and Necessity Requires Operations by said Applicants over a Connection between their lines at or near Republic Michigan.

APPLICATION—Filed March 27, 1958

Come now the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company (hereinafter collectively referred to as "Applicants") and apply under Section 1(18) of the Interstate Commerce Act for a certificate that public convenience and necessity require the operation by said applicants over an interchange connection existing between the lines of the applicant at (or near) Republic in the State of Michigan.

In support of said application applicants respectfully allege and show to the Commission as follows:

a. The exact corporate names of the applicants are:

1. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and

2. Lake Superior & Ishpeming Railroad Company

b. Both applicants are carriers by railroad subject to Part I of the Interstate Commerce Act.

[fol. 58] c.

1. Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation, incorporated March 31, 1927, organized under the laws of the State of Wisconsin, Sections 190.01, 190.02 (9)(c), Wisconsin Statutes 1943. It operates lines of railway in the States of Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington and Wisconsin.

2. Lake Superior & Ishpeming Railroad Company is a corporation, incorporated under the laws of the State of Michigan on August 17, 1923 (effective January 1, 1924). It operates lines of railway in the State of Michigan.

d. At the point of the involved connection the lines of the applicants are adjacent to each other, and during the autumn months of 1957, the applicants constructed and placed in operation a cross-over track and two inter-change tracks over which authority to operate is now sought. Such construction was effected and operations established in the belief that no extension within the meaning of Section 1 (18)-(20) was involved and for that reason no certificate was sought or obtained for the same. Applicants have not extended and do not propose to extend their lines, nor to [fol. 59] acquire and operate, nor to operate, a line of railroad not now owned or being operated by a common carrier.

e. The interchange connection is located wholly within Marquette County, State of Michigan.

f. The interchange connection was accomplished by the construction of a cross-over and two interchange tracks, totaling 3,986 feet in length, the location of which is shown on the attached map. It is not within the limits of any incorporated city or village.

g. No main or branch line tracks are or will be constructed under this proposal. All necessary trackage, as aforesaid, has been constructed and placed in operation. No additional right-of-way was required. The connection

lies entirely within the limits of applicants' pre-existing rights-of-way.

h. It is the position of your applicants that the connection herein, since it consists wholly of switching tracks as contemplated by Sections 1(18) and 1(22) of the Act, does not constitute an extension within the meaning of Section 1 (18) of the Interstate Commerce Act and that operation over said connection does not require authorization by this Commission. Hence a petition to dismiss this application is concurrently being filed. However, the connection herein is required in order to render reasonably adequate and efficient service to the shipping public by means of improved interchange facilities between the applicants.

[fol. 60] i. Both applicants have financed their respective shares of the cost of construction out of treasury cash. No further financial arrangements are contemplated.

j. Authority to file this application was granted:

1. By the Board of Directors of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, at Chicago, Illinois, on February 20, 1958;

2. By the Board of Directors of the Lake Superior & Ishpeming Railroad Company at Marquette, Michigan on March 6, 1958.

k. The names, titles, and post office addresses of the counsel or officers to whom correspondence in regard to this application should be addressed are:

1. R. K. Merrill, Commerce Counsel, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 888 Union Station Building, Chicago 6, Illinois;

2. Bernard H. Davidson, Peninsula Bank Building, Ishpeming, Michigan, and Philip H. Porter, 707 First National Bank Building, Madison 3, Wisconsin.

l. Map attached.

Wherefore, Applicants pray that upon appropriate findings of public convenience and necessity a certificate be

issued pursuant to the provisions of Section 1 (18) of the Interstate Commerce Act certifying that the present and [fol. 61] future public convenience and necessity require the operation by applicants over the cross-over and interchange tracks involved and hereinbefore described for the interchange of freight traffic between the lines of said applicants.

Dated: March 14, 1958.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, By R. S. Stephenson, Vice President and Comptroller.

Lake Superior & Ishpeming Railroad Company, By J. H. Kline, President and General Manager.

[fol. 62] *Duly sworn to by R. S. Stephenson and J. H. Kline, jurats omitted in printing.*

[fol. 64] Clerk's Note:

Map entitled, "C.M.ST.P. & P.R.R.Co.—Plat showing location of C.M.ST.P. & P.—L.S.&I. Interchange Connection Republic Jct., Mich. August 12, 1958" is omitted from the record here. It appears at page 227.

[fol. 65] [File endorsement omitted]

[fol. 66]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

In the Matter of the Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company under Section 1(18) of the Interstate Commerce Act for a Certificate, if such be necessary, that the Public Convenience and Necessity Requires Operations by said Applicants over a Connection between their lines at or near Republic Michigan.

MOTION TO DISMISS—Filed April 9, 1958

Now comes the applicants, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company, and move the Commission to dismiss the application herein for want of jurisdiction by reason of the fact that the operations involved do not require the certificate applied for.

The application is for authority to operate over the trackage whereby the main lines of the two applicant railroads are connected and carload traffic is interchanged between them. At the point of connection, the rights of way of the applicants adjoin. The connecting track consists of but 262 feet and in addition to the connecting track there are tracks for setting out interchanged traffic which, including turnouts, comprise 3,724 feet. All of this trackage was laid in the fall of 1957 by the applicants in the belief that [fol. 67] no certificate of public convenience and necessity was required and for that reason no such certificate was obtained.

I.

The trackage involved is used solely for the purpose of interchanging carload traffic and it is the position of the applicant that such tracks are merely switching tracks

exempted from the provisions of Section 1(18)-(21) under the exemption provided by Section 1(22). *Missouri Pacific R. Co.* v. *Union Pacific R. Co.*, 60 Fed. (2d) 126.

The descriptive terms used in Section 1(22) and in the exemption provided by Section 1(18) are identical and must therefore be given the same meaning. The Commission has in several cases held that tracks which are used solely for interchanging traffic between adjacently located lines of railroad are switching tracks covered by the exemption of Section 1(18). *Texas & Pacific R. Co. Operation*, 247 I.C.C. 285; *Central Ry. of New Jersey*, 254 I.C.C. 344, *St. Louis, S.F. & T. Ry. Co. Trackage Rights*, 267 I.C.C. 30; *Kansas City S. Ry. Co. Purchase*, 252 I.C.C. 113.

In these cases the Commission went even further by holding that if one of the connecting carriers is using the trackage only for interchanging traffic, such trackage is merely a switching track for that carrier, even though the other carrier may be using the same track as its main line or for line-haul purposes.

In the instant case the trackage involved is used by both carriers only for the purpose of interchanging traffic [fol. 68] between them and *a fortiori* is switching trackage which is within the exemption provided by Section 1(22).

II.

In a number of cases it has been held that trackage such as that involved and physical connection of interstate railroads and the establishment of joint through routes by them comprises a field which has been exclusively occupied by the Federal Government and therefore not subject to restrictions or requirements of the states. We recognize the validity of that rule but there is nothing inconsistent in such a rule with the exemption provided by Sections 1(18) and (22).

The subject of the establishment of through joint routes and the provision of facilities and provisions for the interchange of joint-line traffic with connecting carriers is covered by Section 3(4), making it the duty of all carriers to afford all reasonable, proper and equal facilities for the

interchange of traffic with connecting lines; and Section 15(3) gives the Commission power to establish through routes in the public interest.

Thus the power of the Commission comes into play when either or both of two connecting lines are unwilling to establish of their own accord a through route and provide the necessary facilities for the interchange of traffic between them.

When, however, as has been done here, adjacent carriers themselves of their own volition establish the through route and provide the interchange facilities, they are exercising [fol. 69] powers of management which have not been subjected to regulatory restraint by the Act and are only discharging the duties imposed upon them by Section 3(4).

It cannot be maintained, and we have found no case in which it has ever been argued, much less held, that the establishment of a through route between two railroads is *ipso facto* an extension of the line of either merely because traffic moving over one of the lines can find a new outlet over the line of the other. By the establishment of the through route here involved the *Milwaukee* does not in effect extend its line over that of the L.S. & I. nor does the L.S. & I. in effect extend thereby its line over that of the *Milwaukee*.

If the requirements of Section 1(18) are to be held applicable to the instant situation, it must be solely because of the *physical construction and operations involved* and as we have pointed out, those are exempted from such requirements because the traffic involved is switching trackage within the meaning of Section 1(22).

III.

In numerous cases the courts and the Commission have held that the question as to whether a given track was a "spur, industrial, team, switching or side track" within the meaning of the exemption provided by Sections 1(18) and (22), is a mixed question of law and fact. For example, *U. S.* v. *Idaho*, 298 U.S. 105; *City of Yonkers* v. *U. S.*, 320 [fol. 70] U.S. 685; *Seaboard Air Line Ry. Co. Receivers*

Abandonment, 257 I.C.C. 785; *Chicago, Rock Island & Pacific R. Co.* v. *Thompson,* 135 Fed. Supp. 43; *Durham & S.C. R. Co. Control,* 295 I.C.C. 585, 589.

A number of cases have been cited by the petitioner in support of its contention that the certificate applied for is requisite. These cases must be read and considered, as is always the case, in the light of the facts which governed or affected their decision and particularly so where, as here, the question is mixed involving both law and fact.

One of these cases, and perhaps the principal case cited against our position, is *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.,* 271 U. S. 244, in which the Supreme Court held that the Commission had exclusive jurisdiction to authorize or order the connection of the main lines of two railroads. It is true that in that case there is some language which rather indicates that such a connection as that under consideration does not fall within the exemption provided by Section 1(22). However, it is to be noted that the court referred not only to Section 1(18)-(20) but also to the assertion and exercise of power by the Commission in Section 3(4) (which at that time was Section 3(3)). The only issue presented to and necessarily determined by the court was whether or not Congress had preempted the field to require physical connections of the lines of two interstate railroads to the exclusion of any [fol. 71] power thereover by the states. The conclusion might have well been reached and seems to have been based at least in part upon Section 3(3), which is now Section 3(4) and is supplemented by the powers granted to the Commission under Section 15(3).

Furthermore, what is perhaps more important is the factual situation which was presented. From the report of the case by the court below in 131 Miss. 857, it appears clearly that far more than a mere switching-track connection between the two lines was involved. There was a very substantial amount of construction, and as the Supreme Court pointed out, a grave question as to the safety and impairment of interstate commerce because of the location of the desired junction point. In the report of the case below, it appears (from the briefs reported) that the two railroads at no point were within 12 miles of each other

and at the point of the proposed connection they were not less than 40 or 50 miles apart. Obviously such a proposed track would clearly come under the provisions of Section 1(18).

It is important to note also that the case presented an adversary dispute between the two railroads. In other words, the situation could not be one resolvable under Section 1(18) since a certificate would be merely permissive and enabling. The issue between the two railroads could have been resolved only under Section 3 or 15.

[fol. 72] Another case cited by petitioner is *People ex rel. N.Y. Central* v. *Public Service Commission*, 233 N.Y. 113, 135 N.E. 195. In this case again it was held that the Interstate Commerce Commission had exclusive jurisdiction to require a connection between two railroads—the New York Central and the Lehigh Valley. Again an adversary proceeding is involved and the court held directly that the relief sought was affordable only by the Interstate Commerce Commission under Section 3. It is true that the New York court overruled an objection that the connection of a switching track was exempted by Section 1(22) from the provision requiring a certificate before abandonment. Such a holding was mere *obiter dictum.*

The third case cited is *El Dorado & Western Ry. Co.* v. *Chicago R. I. & P. R. Co.*, 5 Fed. 2d 777. Here again the issue was strictly whether the State of Arkansas or the Interstate Commerce Commission had jurisdiction to order a connecting track. The proposed track extended from the El Dorado 1500 feet across the right of way and 4 tracks of the objecting railroad, the Rock Island, in order to reach and connect with the Missouri Pacific. The Rock Island claimed interference with its tracks and terminals and showed that it could perform the interchange between the El Dorado and the Missouri Pacific. It is true that the El Dorado claimed that the track was merely a switch track and exempt under the provisions of Section 1(22) and [fol. 73] that such claim was overruled. But the factual difference between the proposed track in that case and the trackage involved in the instant case will be noted as well as the distinction created by the issue raised by an objecting carrier in the case cited that the proposed track cross-

ing its right of way and 4 of its tracks would interfere unnecessarily with the operation of its tracks and terminals and with interstate commerce. Clearly it was a case in which the Interstate Commerce Commission had exclusive jurisdiction.

The fourth case cited is *Charleston & Western Carolina Ry. Co. Construction,* 166 I.C.C. 707. In this case it was proposed to supplant a connection between the Charleston and the Clinchfield railroads via 1000 feet of the Southern Railway's trackage with a new track to be constructed by the Charleston *2 miles in length and including a 750-foot tunnel.* It was necessary to acquire the requisite rights of way and intervening lands in order to effect such connection and to relocate certain trackage of both the Charleston and the Clinchfield. The jurisdiction of the Commission does not appear to have been seriously questioned but at the most "some doubt" expressed as to whether the proposed connection was an extension covered by Section 1(18), which doubt the Commission resolved in favor of its jurisdiction. Again the factual situation is far different from what is presented by the instant application.

[fol. 74] Wherefore, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company, the applicants herein, respectfully move that the Commission enter an order dismissing their application on the ground that the trackage over which operations are involved constitutes switching tracks within the meaning of Section 1(22) and that therefore no certificate authorizing such operation is required by the Act.

Respectfully submitted,

Bernard H. Davidson, Peninsula Bank Bldg., Ishpeming, Michigan;

Philip H. Porter, 707 1st National Bank Bldg., Madison 3, Wisconsin;

R. K. Merrill, 888 Union Station Bldg., Chicago 6, Illinois,

Attorneys for Applicants.

April 3, 1958.

[fol. 75]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY ET AL.—OPERATION—CONNECTING TRACKS—REPUBLIC, MICH.

ORDER PERMITTING INTERVENTION BY CHICAGO AND NORTH WESTERN RAILWAY COMPANY—May 19, 1958

In the Matter of Petition for Leave to Intervene in Opposition to the Application.

Present: Richard F. Mitchell, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on March 27, 1958, a joint application was filed by Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior and Ishpeming Railroad Company for authority to operate over a cross-over track and two interchange tracks which connects their lines and which applicants constructed and placed in operation at, or near, Republic, Marquette County, Michigan;

It further appearing, That on May 5, 1958, Chicago and North Western Railway Company filed its petition for leave to intervene in opposition to the proposed transaction for the protection of its interest as the same may appear; and

It further appearing, That petitioner has shown an interest sufficient to warrant intervention;

It is ordered, That said Chicago and North Western Railway Company be, and it is hereby, permitted to intervene and be treated as a party to this proceeding;

It is further ordered, That a copy of this order be served upon each of the parties to this proceeding and the Governor and Public Service Commission of the State of Michigan.

Dated at Washington, D. C., this 19th day of May, A. D. 1958,

By the Commission, Commissioner Mitchell.

Harold D. McCoy, Secretary.

(Seal)

[fol. 76]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY ET AL.—OPERATION—CONNECTING TRACKS—REPUBLIC, MICH.

ORDER PERMITTING INTERVENTION BY DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY—May 28, 1958

In the Matter of Petition for Leave to Intervene in Opposition to the Application.

Present: Richard F. Mitchell, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

It appearing, That on March 27, 1958, a joint application was filed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and The Lake Superior and Ishpeming Railroad Company for authority to operate over a cross-over track and two interchange tracks, which connect their lines and which applicants constructed and placed in operation, at or near, Republic, Marquette County, Michigan;

It further appearing, That on May 21, 1958, Duluth, South Shore and Atlantic Railroad Company filed its petition for leave to intervene in opposition to the application alleging that petitioner is informed and believes that a large proportion of the freight interchanged by it with Chicago, Milwaukee, St. Paul and Pacific Railroad Company, at Champion, Michigan, to and from stations of petitioner, which are also stations on the line of Lake Superior

and Ishpeming Railroad Company, has been diverted from petitioner as a result of the connection at or near Republic, Michigan, and has and will continue to have a substantial and serious effect upon its gross revenues and its ability to pay operating expenses, taxes and to earn a fair return on its railway property;

It further appearing, That petitioner has shown an interest sufficient to warrant intervention;

It is ordered, That said Duluth, South Shore and Atlantic Railroad Company be, and it is hereby, permitted to intervene and be treated as a party to this proceeding;

It is further ordered, That a copy of this order be served upon each of the parties to this proceeding and the Governor and Public Service Commission of the State of Michigan.

Dated at Washington, D. C., this 28th day of May, A. D. 1958.

By the Commission, Commissioner Mitchell.

Harold D. McCoy, Secretary.

(Seal)

[fol. 77]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

In the Matter of the Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company under Section 1 (18) of the Interstate Commerce Act for a Certificate, if such be necessary, that the Public Convenience and Necessity Requires Operations by said Applicants over a Connection between their lines at or near Republic, Michigan.

RETURN TO QUESTIONNAIRE—Filed May 26, 1958

Bernard H. Davidson, Peninsula Bank Building, Ishpeming, Michigan;

Philip H. Porter, 707 First National Bank Building, Madison 3, Wisconsin;

R. K. Merrill, 888 Union Station Building, Chicago 6, Illinois,

Atorneys for Applicants.

[fol. 78] The Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, having made application to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act for a certificate, if such be necessary, that the public convenience and necessity requires operations by said applicants over a connection between their lines at or near Republic, Michigan which application is filed in the office of the Commission in Finance Docket No. 20139 hereby affirms that notice of the application has been published in the form prescribed by the Commission, at least once during each of three consecutive weeks, in "The Mining Journal"; that said newspaper is of general circulation in Marquette County, State of Michigan, which is the only state and county in which the line to be operated is situated and that the newspaper clipping hereto attached

contains true copies of the notice as published in said newspaper.

Philip H. Porter for said applicants (Newspaper clipping attached to the original return to questionnaire filed with the Commission)

[fol. 79]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

In the Matter of the Application of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company under Section 1 (18) of the Interstate Commerce Act for a Certificate, if such be necessary, that the Public Convenience and Necessity Requires Operations by said Applicants over a Connection between their lines at or near Republic, Michigan.

Return to Questionnaire

Now come the applicants, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company (herein referred to as the Milwaukee and LS&I respectively) and submit the following return to the questionnaire pursuant to the Commission's rules and requirements pertaining thereto:

1. The essential facts to show that the applicant is a carrier by railroad, engaged in the transportation of passengers or property, subject to the Interstate Commerce Act, or is a corporation organized to construct and operate a railroad. If not incorporated, so state, giving complete description of party or parties filing the application.

Answer: LS&I is a corporation existing under and by virtue of the laws of the State of Michigan and authorized to do business as a railroad corporation within that state. It owns and operates a line of railroad of about 170 miles in length lying wholly within the upper peninsula of Michi-

gan and is engaged in the interstate transportation of property subject to the Interstate Commerce Act.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation organized under the laws of the State of Wisconsin and authorized to operate and is operating its property, subject to the Interstate Commerce Act, as a common carrier of freight and passengers in the following states: Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, [fol. 80] South Dakota, Washington and Wisconsin.

2. Whether the proposed new line of railroad would be both constructed and operated by the applicant.

Answer: Applicants do not propose to construct either a new line of railroad or an extension of an existing line of railroad. Together they have constructed by joint action a connecting track between their respective lines which are located adjacent to each other at a point near Republic, Michigan, and trackage for the interchange of cars between such lines over which trackage each applicant proposes to operate.

3. Whether any corporation, individual, or trustee holds control over the applicant at the date of filing this return. If so:

(a) The form of control, whether sole or joint, and whether in trust.

(b) The name and business address of the controlling corporation, individual, or trustee.

(c) The manner in which control was established.

(d) The extent of control.

(e) Whether control is direct or indirect; if indirect, the name and business address of the intermediary through which it was established and is exercised.

(f) The name and business address of the beneficiaries for whom the trust, if any, is maintained.

(g) The purposes of the trust.

Answer: Applicant Chicago, Milwaukee, St. Paul and Pacific Railroad Company retains complete control of its properties at date of the filing of this return.

The Cleveland Cliffs Iron Company, Union Commerce Building, Cleveland, Ohio, holds and owns 75.245 per cent of the common stock of LS&I acquired in a consolidation of two companies to form LS&I and approved by the Commission in Finance Docket No. 3362 (86 I.C.C. 313).

[fol. 81] 4. Whether the applicant is connected by stock ownership, or otherwise, with any industry to be served by the line proposed to be constructed, acquired, or operated. If so, state the facts.

Answer: The trackage to be operated is constructed and will be used to serve no particular industry but to handle the interchange of traffic generally between the applicant railroads.

5. The chief uses and purposes of the proposed line or operation.

Answer: The sole purpose of the proposed operation is to interchange freight cars and carload freight traffic between the lines of the applicants.

6. The classes of service to be performed, as passenger, freight, express, and switching.

Answer: On the switching of freight cars and carload freight traffic for interchange between the applicants.

7. The kind of motor power to be used. If electric power, state source and estimated cost.

Answer: Diesel—electric locomotives.

8. Whether the line proposed to be constructed, acquired, or operated would receive material revenue from the terri-

tory traversed, or serve any material public convenience and necessity of the local territory.

Answer: The proposed operation traverses no territory; no line extension is involved or proposed; no new or additional territory is proposed to be served.

9. The name, area, and population of each county in which the new line is to be constructed, or in which the line to be acquired or operated is located, and the name and population of each city, town, and village at which a station would be or is established, together with its distance from a designated initial point, with the source of information as to population.

[fol. 82] Answer: Applicants do not propose to construct or operate either a new line of railroad or an extension of an existing line of railroad. The connecting track and switching trackage involved is located in Marquette County, Michigan, of which the area is 1841 square miles and the population according to the U.S. official census of 1950 is 47,454. The point of connection involved is located 2.05 miles north of the *Milwaukee's* depot in the unincorporated community of Republic, Republic Township, (pop. 1092) Marquette County, Michigan.

10. The names of places mentioned in Question 9 that are now served by common carrier railroads (excluding street railways), and the name of each such carrier serving the several places.

Answer: Republic is served only by LS&I and the *Milwaukee.*

11. Names of the places mentioned in Question 9 that have no common carrier railroad service, the distance in miles of each such place from the nearest station of a common carrier railroad, and the character of the connecting railroad.

Answer: None; see answer to Question 10.

12. The name and population of each city, town and village together with state and county in which located, within the area to be served but not on the proposed route.

Answer: Not applicable.

13. The approximate distance in miles by highway from the nearest station on the line to be constructed or acquired to each of the places mentioned in Question 12, and the names of all common carrier railroads that now serve each of the places.

Answer: Not applicable.

14. The names of common carrier railroads with which the line would connect, and the proposed points of track connection.

Answer: Not applicable.

[fol. 83] 15. The number of common carrier truck and bus lines operating in the area to be traversed by the line, and the character of service performed by each.

Answer: Not applicable.

16. The general character of the country which the line would serve. Indicate whether it is level, rolling, mountainous, cultivated, pasture, prairie, desert, rocky or timbered, etc.

Answer: Not applicable.

17. The approximate area of the territory to be served by the line, an estimate of population therein, and the area, (1) in timber, (2) in pasture, and (3) under cultivation.

Answer: Not applicable.

18. The kinds of industry carried on in the area to be served, such, for example as farming, dairying, grazing, coal-mining, manufacturing, lumbering, etc., and the relative importance of each.

Answer: Not applicable; but the operation proposed will be principally for interchanging forest products from the area served by the LS&I to the *Milwaukee* for transportation to destinations on the line of the latter.

19. The main facts as to the age, growth and extent of such industries, their probable future growth and permanence, and the reasons therefor.

Answer: Not applicable; but after about five years the forest products traffic involved is expected to decline with the depletion of the heavier forest growth within the areas served by the LS&I.

20. What carriers now serve these industries and to what extent.

Answer: Not applicable; but a portion of the forest areas served by the LS&I are also in part served by the Duluth, South Shore and Atlantic Railroad Company.

[fol. 84] 21. Whether the chief support of the line to be constructed or acquired would come from the general community or from some particular industry or industries, located or to be located. In the latter case, give facts concerning such particular industry or industries and applicant's contractual or financial relation thereto.

Answer: Not applicable. No particular community is to be directly served. Cleveland Cliffs Iron Company has substantial holdings within the forest areas which produce the major portion of the traffic to be interchanged between the two applicants. Industries on the Milwaukee using manufacture and re-shipment rates will derive especial benefits and value.

22. Whether the proposed line of railroad would be built, acquired, or operated primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business would be so benefited, what such advantages would be, and the applicant's contractual or financial relation to said industry.

Answer: The connection was built and is proposed to be operated for the improvement of the service of the general public rendered by the applicants.

23. If the line is to be or is an extension of an existing railroad, or a branch, connecting track, or cutoff, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line.

Answer: The connecting track is not expected to generate new traffic but will facilitate the handling of freight moving between Milwaukee railroad points on the one hand and on the other points on the LS&I. Its direct profit will be only incident to the elimination of an intermediate carrier and divisions of rates with such carrier for its services which will become unnecessary.

[fol. 85] 24. If the line is to be a connecting link between existing railroads, the kind and volume of traffic, expressed in tons or carloads, that probably would be interchanged, and the economies that would be effected by such interchange.

Answer: It is anticipated that 2800 carloads per year would be interchanged between the LS&I and Milwaukee consisting of logs and chemical wood originating on the LS&I and terminating at Iron Mountain, Michigan and other points on the Milwaukee Railroad together with approximately 260 carloads of miscellaneous traffic. It is also anticipated there will be 96 carloads of various commodities originating at points on the Milwaukee System which will terminate at points on the LS&I.

The connection at Republic Junction will permit the Milwaukee to receive log shipments originating on the LS&I directly from the LS&I without necessity of movement via circuitous routes over intermediate lines.

25. Of the interchange traffic mentioned in answer to paragraph 24, what part, expressed in tons or carloads, cannot be hauled or moved by existing railroads or truck lines.

Answer: All of traffic can be and is handled by existing railroads.

26. The facts concerning any agreement, tentative or otherwise, with existing carriers, covering operation, interchange of traffic, division of rates, or trackage rights, in connection with the line.

Answer: Copy of tentative agreement between the LS&I and Milwaukee is attached.

27. Whether any aid, gift, grant of right-of-way, or other donation has been promised in connection with the proposed new line of railroad; if so, state specifically the nature, amount, and value of such promised donations.

Answer: There has been no aid, gift, grant of right-of-way or donation in connection with construction of the interchange track.

[fol. 86] 28. The manner in which it is proposed to finance construction and equipment, or acquisition, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities would be underwritten by industries to be served by the proposed line.

Answer: Construction has been financed out of current funds of the applicants.

29. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years of operation, together with an estimate of the annual gross revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived, also chief points or territories of origin and destination.

Answer: Based upon experience to date LS&I expect to move annually about 2800 cars of logs of chemical wood

and other raw forest products from points on its east branch over the involved connection with the Milwaukee. This movement is expected to continue for five years at such volume after which it will gradually decline to about 50% of its present volume due to the depletion of the tributary forests. The rate to Iron Mountain, the principal destination, ranges from 15 to 17 cents per 100 pounds, and to Amasa, Michigan, it is 17 cents per 100 pounds. It is estimated that this traffic will produce gross revenues to the applicants of $397,600 per annum. The mean length of haul would be 174 miles.

In addition, the LS&I expects to originate and handle over this connection annually for the first five years thereafter 120 carloads of charcoal, 50 carloads of paper, 40 carloads of sawdust, etc., and 50 carloads of miscellaneous lading. This traffic would originate at various points on the LS&I and would be destined to various points on the Milwaukee and it would be impracticable to estimate either the average rate or the mean length of haul but experience would indicate that the average gross revenue from such traffic to the applicants would be $296.15 per car or in all $77,000 per annum.

[fol. 87] The Milwaukee expects to forward to the LS&I 96 carloads of miscellaneous traffic per year which, based upon past experience will produce $17,450 gross revenue or $181.77 per car to the applicants.

In total, applicants expect to handle 3,156 carloads of traffic per year, during the first five years, over the interchange track. This traffic should produce $305,950 to the LS&I and $186,100 to the Milwaukee or a total of $492,050 to both applicants.

During the following five years, due to depletion of the forests, it is expected that the total number of carloads will decline to 1,756 which will produce annual revenue to the LS&I of $164,550 and to the Milwaukee $128,700 or a total of $293,250 to both applicants.

30. The estimated gross revenue, operating expenses, net revenue, and net railway operating income, corresponding with the estimates of traffic under paragraph 29. By

"net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

Answer: The Milwaukee's proportion of the gross revenue for each of the first five years will be $186,100. For the year of 1957 the Milwaukee had an operating ratio of 81.95% and a total expense ratio, including operating expenses, tax accruals and net rents, of 93.54%.

The total expense ratio when applied to the revenue of $186,100 results in an estimate of the total expenses of $174,078 leaving net railway operating income of $12,022 per year.

After the first five years proportion of gross revenue to the Milwaukee will be $128,700. The net railway operating income from this traffic, computed on the same basis, would be $8,314 per year.

[fol. 88] The LS&I proportion of the gross revenue for the first five years will be $311,700. The operating ratio for the LS&I in 1957 was 59.93 per cent, and the total expense ratio, including tax accruals and net rents, was 79.67 per cent. On the basis of the latter the contribution of this traffic to net railway operating income would be $63,370.

After the first five years the contemplated LS&I proportion of gross revenues from the involved traffic is $164,560 which, on the basis of the total expense ratio, would contribute $13,400 to net railway operating income.

31. The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

Answer: Not applicable. No new line of railroad but merely a connection of adjoining trackage is involved. It is not expected that net additional business will be generated by the proposed operation.

32. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

Answer: The trackage involved was completed and operations over it were commenced on October 21, 1957.

33. The engineering work in full detail which has been done with respect to the proposed new line at the time of filing the return.

Answer: Not available.

34. The following details concerning the line to be constructed: (a) The gage and number of main line tracks. (b) Weight of rail for main line track. (c) Rate of maximum grade in each direction, and whether and how compensated for curvature. (d) Rate of limiting grade that will fix train loading in each direction, and whether and how compensated for curvature. (e) If helper grades are to be used, the location, length, rate and direction of ascent for each. (f) The maximum rate of curve. (g) The average amount of curvature per mile, in degrees. (h) The approximate length and height of wooden trestles or other temporary construction.

[fol. 89] Answer: Not applicable.

35. An estimate of total increase in charges to road and equipment account during the first five years after completion of the new line. If this displaces rental charges on equipment, so show.

Answer: None.

36. Any additional facts or reasons to show that the public convenience and necessity require the granting of this application.

The proposed operation will provide the only physical connection between the applicant lines of railroad and will thus make possible direct two-line service between all points on the LS&I and the Milwaukee which hitherto have been served only by three-line haul involving greater circuity of mileage and longer time in transit together with

the additional transfer between lines necessarily involved. The saving in time and in mileage transported for various shipments will depend upon the location of the points of origin and destination on the respective lines of the applicants. Especial benefits will accrue to industries on the Milwaukee using forest products originating on the LS&I and processing the same in transit under manufacture and re-shipment rates.

[fol. 90]

ATTACHMENT TO RETURN TO QUESTIONNAIRE

This agreement entered into this First day of November, 1957 between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "Milwaukee Company") and the Lake Superior & Ishpeming Railroad Company (hereinafter called "Ishpeming Company").

WITNESSETH:

Whereas, a segment of main track owned by Milwaukee Company and a segment of main track owned by Ishpeming Company in the S½ of the SE¼ of Section 32, T47N, R26W, and in the NW¼ of the NE¼ of Section 5, T46N, R26W are adjacent to each other and the parties hereto are mutually desirous of providing interchange tracks in that area upon the terms and conditions hereinafter set forth for the construction and joint use of those interchange tracks shown in colors blue and red between letters D and E on blueprint hereto attached, marked Exhibit A, and also providing for the construction of a crossover track between Milwaukee Company's line and Ishpeming Company's line as shown on said blueprint between points A and C, and

Whereas, Milwaukee Company desires the right to operate over four thousand two hundred (4,200) feet of the main track of Ishpeming Company between points C and I shown in yellow on attached Exhibit A for the purpose of facilitating the interchange of cars between Ishpeming Company and Milwaukee Company, and Ishpeming Company is willing to grant to Milwaukee Company the right

to use such segment of track under the terms and conditions provided for in this agreement.

Now, therefore, in consideration of the premises and the mutual covenants and conditions hereinafter set forth it is hereby agreed by and between the parties hereto as follows:

[fol. 91] Section 1—Construction and Maintenance of Facilities.

The cost of constructing and maintaining the said facilities shall be apportioned and paid for as follows:

(a) Turnout one hundred forty-eight (148) feet long shown in red between points A and B on the attached Exhibit A to be constructed, owned and maintained by the Milwaukee Company at its sole expense.

(b) Turnout one hundred fourteen (114) feet long shown in blue between points B and C on attached Exhibit A to be constructed by Ishpeming Company, the entire cost thereof to be borne by the Milwaukee Company, and the turnout shall become the sole property of Ishpeming Company, but Milwaukee Company shall pay the full cost of improving, maintaining and renewing this turnout in accordance with the terms shown under section 4—use of facilities.

(c) A segment of No. 1 transfer track nine hundred two (902) feet long and a segment of No. 2 transfer track nine hundred eleven (911) feet long including turnout at point F, shown in red between points F, G and G-1 on attached Exhibit A, to be constructed, owned and maintained by Milwaukee Company at its sole expense.

(d) A segment of No. 1 transfer track eight hundred forty-seven (847) feet long and a segment of No. 2 transfer track eight hundred thirty-five (835) feet long between points G, G-1 and H including turnout at point H, turnout one hundred twenty-eight (128) feet long between points H and E and turnout one hundred one (101) feet long between points D and F, shown in blue on attached Exhibit A, to be constructed, owned and maintained by Ishpeming Company at its sole expense.

[fol. 92] Section 2—Land for Milwaukee Company Tracks.

Ishpeming Company grants the Milwaukee Company so much of its land as is necessary for the construction, maintenance, repair, renewal and operation of the portions of trackage to be constructed, owned and maintained by the Milwaukee Company so long as this agreement shall remain in force.

Section 3—Lease of Main Line Segment of Ishpeming Company to Milwaukee Company.

Subject to the terms and conditions of this agreement Ishpeming Company gives and grants to Milwaukee Company the right and privilege to enter upon and use four thousand two hundred (4,200) feet of its main track between points C and I for the purpose of facilitating the interchange of cars between Ishpeming Company and Milwaukee Company and for no other purpose.

Milwaukee shall pay to Ishpeming Company for use of this track $25.00 per month of which one-half (½) shall be considered rental and one-half shall be considered maintenance expense. This maintenance expense shall be subject to increases in the same manner as shown under Section 4 for maintenance of turnout between points B and C.

Section 4—Use of Facilities.

In order that joint operation of interchange tracks may be assured, Milwaukee Company grants to Ishpeming Company, without charge, the right to use its interchange tracks shown in red on Exhibit A between points F, G and G-1, and Ishpeming Company grants Milwaukee Company, without charge, right to use its interchange tracks shown in blue on Exhibit A between points D and F and between points G, G-1 and E.

[fol. 93] Ishpeming Company grants Milwaukee Company the right to use turnout shown in blue on attached Exhibit A between points B and C, but Milwaukee Company shall bear the whole cost of maintenance and repairs thereof, which, based on a rate for section labor of $1.828 per hour,

is twenty-five ($25.00) dollars per month. If any change occurs in the rate of section labor during any year this maintenance cost shall be adjusted to reflect the same ratio of change effective the first of the year following that in which the change occurs.

Section 5—Additions and Betterments to Joint Facilities.

Each party hereto shall bear the total cost of additions and betterments to its wholly owned tracks as described in Section 1 except as follows:

(a) Ishpeming Company shall make all improvements to turnout between points B and C, and additions and betterments costs chargeable to the investment accounts according to the rules and regulations of the Interstate Commerce Commission shall be borne solely by the Milwaukee Company, and become the property of the Ishpeming Company.

(b) The cost of additions and betterments to the jointly used facilities required for the benefit of both parties, and the cost and expense of grade crossings, grade separations, grade crossing protection and other public improvements which may hereafter be required shall be borne and paid by each party equally.

(c) It is contemplated by the parties hereto that protective signals on the Ishpeming Company's main line will not be necessary, however, in the event that any governmental body shall require them, or due to the existence and use of [fol. 94] these interchange tracks Ishpeming Company finds it necessary that signals, spring or power switches or other devices be installed to govern the movement of trains on Ishpeming Company's main track at or about this point of interchange, Ishpeming Company shall install, maintain, repair and renew such protective equipment and the cost thereof shall be borne equally by both parties hereto.

Section 6—Operation of Joint Facilities.

(a) Milwaukee Company shall deliver cars to Ishpeming Company on track designated as track No. 1 and Ishpeming

Company shall deliver cars to Milwaukee Company on track designated as track No. 2 on Exhibit A.

(b) Waybill lists shall be transferred through a waybill box provided by Ishpeming Company and placed at a convenient location.

(c) The manner in which said jointly used tracks shall be operated in common, other than as stated in paragraphs (a) and (b) of this section, shall be from time to time agreed upon by the respective superintendents then having charge of the division of each party to which said tracks shall then belong. If such superintendents cannot agree upon the manner of such use, the same shall be agreed upon by the General Superintendents or General Managers of the respective parties.

Section 7—Retirement Losses.

Each party hereto shall bear retirement losses on its wholly owned tracks as described in Section 1 except that in the event of the retirement of Track "B-C", Milwaukee [fol. 95] Company will assume the cost of dismantling, less salvage, and restoring Ishpeming Company's track and property to their former condition.

Retirement losses as a result of additions and betterments required for the benefit of both parties or retirement losses in connection with jointly owned property shall be borne equally by each party hereto.

Section 8—Billing for Expenses.

(a) The method and manner of keeping accounts in connection with the construction, operation, maintenance, repair and renewal of the joint facilities and the construction and installation of additions, betterments and extensions thereto and changes therein shall at all times be in accordance with the then current applicable accounting rules of the Interstate Commerce Commission.

(b) Bills for fixed charges shown in Sections 3 and 4 shall be rendered annually in December of each year.

(c) All bills for construction and other expenses shall include the items, amounts, percentages, etc. then currently

in effect under the rules and regulations of the General Managers' Association of Chicago. All such bills shall be rendered monthly and be promptly paid by the debtor company.

Section 9—Taxes.

It is understood and agreed that each of the parties hereto will report its undivided interest in the joint facilities provided for herein to the proper assessing body or officer for taxation to which it is subject, and each of said parties shall pay direct all taxes and assessments which shall be assessed against its undivided interest.

[fol. 96] Section 10—Abandonment of Lines.

(a) In the event that either party hereto shall abandon or desire to abandon its section of the joint interchange tracks or any portion thereof, it shall give notice thereof to the other party hereto at least sixty (60) days in advance of the date on which it shall stop using the joint tracks or the portion thereof which it desires to abandon and the party receiving such notice agrees, if it desires to continue operation, to purchase the interest of the other party in and to the joint facility or such portion thereof to be abandoned and shall pay such party the net salvage value thereof.

(b) In the event both parties shall abandon or desire to abandon use of the joint track or a portion thereof then in such event the parties hereof shall dismantle the joint facility or the portion thereof involved and the salvage of each part thereof shall be divided between the parties on the basis of their respective ownership therein.

Section 11—Maintaining Company to Exercise Reasonable and Customary Care.

(a) The party hereto obligated hereunder with the duty of performing the work of constructing, installing, maintaining, repairing and renewing a facility which is also used by the other party hereto shall be bound to use only reasonable and customary care, skill, and diligence in so construct-

ing, installing, maintaining, repairing and renewing such facility and the other party hereto shall not, by reason of any defect in any portion of such facility, or by reason of the failure or negligence of the maintaining party to repair any such defect, have or make against the maintaining party hereto any claim for loss, damage or injury arising [fol. 97] from such defects, negligence or failure.

(b) If any party charged with the maintenance of any of the above described tracks shall fail to make necessary repairs and renewals to said tracks, the other party may, after ten (10) days notice in writing, make such repairs and renewals and bill against the other party for its proportion of the expense thereof.

Section 12—Liability and Indemnity.

Employees of the respective parties hereto while engaged in the construction, maintenance, repair, renewal, relocation or reconstruction of wholly owned property shall, for the purpose of fixing liability under this section, be considered and held to be sole employees of the party owning the property, provided, however, that employees of Ishpeming Company while engaged in the construction, maintenance, repair, renewal, relocation or reconstruction of the turnout between points "B" and "C" shall, for the purpose of fixing liability under this section, be considered and held to be employees of Milwaukee Company.

Employees of the parties hereto while engaged in the construction, maintenance, repair, renewal, relocation or reconstruction of any facilities subsequently jointly owned shall, for the purpose of fixing liability under this section, be considered and held to be joint employees of the parties hereto.

For the purpose of determining as between the parties hereto the bearing of damages as hereinafter defined, occurring in or in connection with the construction, maintenance, repair, renewal or operation of the trackage upon which both parties hereto will operate pursuant to the provisions of this agreement, the following provisions shall be observed by the parties hereto and shall govern.

[fol. 98] (a) The term damages as used in these liability provisions shall include (1) expenses for or on account of injuries to or death of persons; (2) expenses for or on account of loss of or damages to property; and (3) costs, fees and other expenses in connection with such loss, damage, injury or death, exclusive of compensation of regularly retained salaried attorneys and claim agents.

(b) When the operation of trains, engines and cars of only one of the parties hereto is involved, such party hereby agrees to save the other party hereto harmless from all damages caused solely by the negligent acts or omissions of its own sole employees or defects in its engines, trains or cars whether with or without the fault of joint employees.

(c) In the event that there shall be a collision on any of the tracks in this agreement described, on which the parties hereto both operate, between engines, trains or cars operated by te Milwaukee Company and engines, trains or cars operated by the Ishpeming Company (1) if such collision shall be caused by the sole negligence of one of the parties hereto, whether with or without the negligence of joint employees, the party hereto whose sole employees are at fault shall bear and pay all such damages resulting from such collision; and (2) if such collision shall be due to joint or concurring negligence of sole employees of the Milwaukee Company on the one hand and of sole employees of the Ishpeming Company on the other hand, whether with or without the concurring negligence of joint employees, the Milwaukee Company on the one hand and the Ishpeming Company on the other hand, shall each bear and pay the [fol. 99] damages to its engines and cars and persons in or contents of such cars and to its sole employees, and other damages, if any, shall be divided in equal amounts between the parties hereto.

(d) In the case of damages caused by the negligent acts or omissions of joint employees, as hereinbefore defined, or caused otherwise than as hereinbefore described, or in cases where responsibility for damages cannot be determined, or where liability therefor is not covered by any other liability provision in this agreement contained, such

damage shall be borne and paid by each of the said parties as to its own property and as to property within its custody and as to its sole employees and passengers. Damage caused as aforesaid to joint employees and to any other persons and property other than hereinbefore described and to jointly used track covered by this agreement shall be borne jointly and equally by the parties hereto.

(e) If either party hereto shall pay or be compelled to pay any sum or sums for which the other party hereto is liable under the provisions of this agreement, the party liable therefor hereunder agrees to repay, to the paying party, such sum or sums, together with all costs and expense incident thereto, promptly and upon receipt of bill therefor; provided, however, that neither party hereto shall pay any such sum for which it is not liable under the provisions hereof, without giving to the other party hereto, an opportunity to assume or defend against, the payment thereof.

(f) In case a suit or suits shall be commenced against [fol. 100] either party hereto for or on account of any damages for which the other party hereto is liable under the provisions of this agreement, the party so sued shall give to the other party hereto prompt notice in writing of the pendency of such suit, and thereupon, the party notified shall assume the defense of said suits and shall save and hold harmless the party so sued from all loss, cost and expense by reason thereof. Neither party hereto shall be concluded by any judgment against the other party hereto unless it shall have received reasonable notice that it is required to defend and shall have had reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

Section 13—Term of Agreement.

This agreement shall continue in full force and effect until cancelled by either of the said parties hereto on six (6) months' notice to be given in writing to the General Manager or chief operating officer of the other party.

This agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

In witness whereof the parties hereto have executed this agreement as of the day and year first herein written.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

By .....
President

Attest:

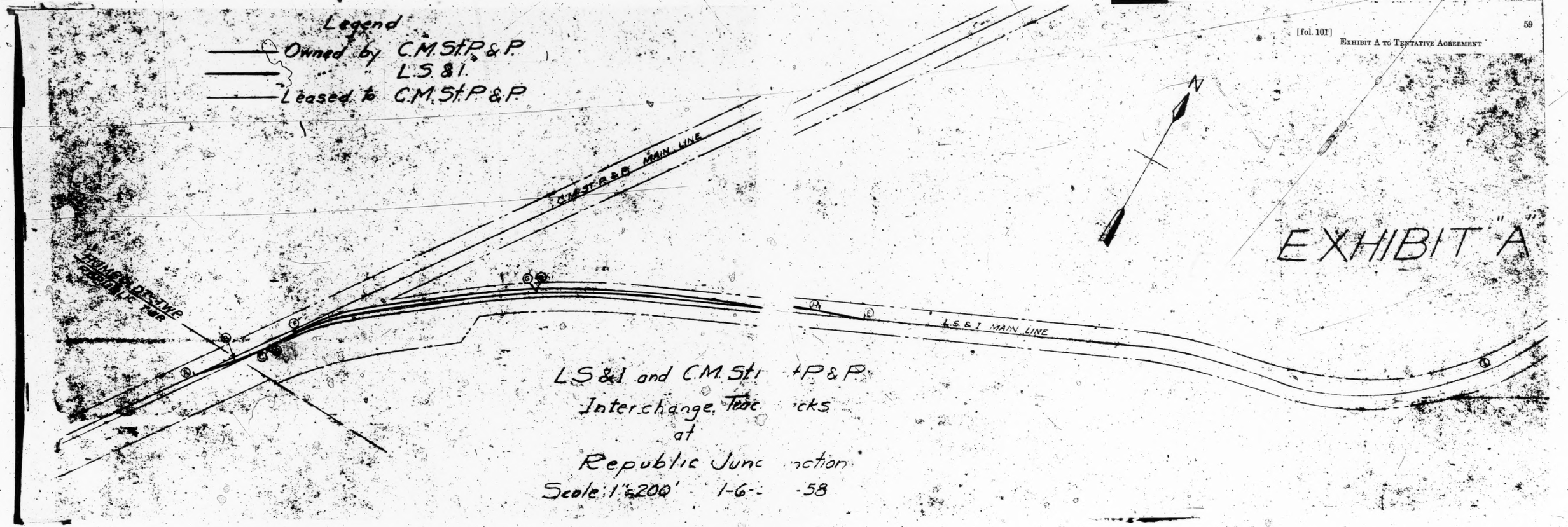
.....
Secretary

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY

By .....
President

Attest:

.....
Secretary


Legend
Owned by C.M.St.P.& P.
" " L.S.&I.
Leased to C.M.St.P.& P.
C.M.ST.P.&P. MAIN LINE
L.S.&I. MAIN LINE
N
EXHIBIT "A"
L.S.&I and C.M.St. P.& P.
Interchange Tracks
at
Republic Junction
Scale 1"=200' 1-6-58

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY

Detailed estimate of cost of constructing 1,911 feet of track to connect with tracks to be constructed by the Chicago, Milwaukee, St. Paul & Pacific Railroad at Republic Junction to be used for interchange of cars.

I.C.C. Account	Item				
1	Engineering			$ 200	$ 200
2	Right-of-way - Tracks located on existing right-of-way				
3	Grading -				
	Common excavation	2400 cu.yds.	@ .63	1,510	
	Rock	165 " "	@ 4.50	750	
	Muck	50 " "	@ .63	30	2,290
8	Ties-Cross ties	750	@ 4.00	3,000	
	Switch ties	1800 lin. ft.	@ .60	1,080	4,080
9	Rails - 41 Gross Tons		@ 30.00		1,230
10	Other track material -				
	Turnouts - 3		1,100.00 ea.	3,300	
	Angle bars - 125 pr.		@ .60	75	
	Step Joints- 6		@ 5.00	30	
	Tie plates - 2000		@ .45	900	
	Track spikes - 26 cwt.		@ 11.00	285	
	Track bolts - 6 cwt.		@ 15.00	90	
	Nut locks - 500		@ .10	50	4,730
11	Ballast				
	Pit gravel - 350 cu.yds.		@ .75	260	260
12	Track laying and surfacing				
	Placing turnouts 3		@ 250.00	750	
	Track laying and surfacing 1,911 ft.		@ 1.60	3,060	3,810
					$ 16,600

[fol. 102]

EXHIBIT E TO RETURN TO QUESTIONNAIRE

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Finance and Accounting Department [fol. 103]

EXHIBIT F TO RETURN TO QUESTIONNAIRE

GENERAL BALANCE SHEET AS OF MARCH 31, 1958

Acct. No.	ASSETS	
	CURRENT ASSETS	
701	Cash	$ 8,424,848.72
702	Temporary cash investments	10,545,250.00
703	Special deposits	8,119,051.25
706	Net balance receivable from agents and conductors	4,587,497.99
707	Miscellaneous accounts receivable	5,220,083.05
708	Interest and dividends receivable	233,886.72
709	Accrued accounts receivable	5,441,416.93
710	Working fund advances	677,373.01
711	Prepayments	237,088.72
712	Material and supplies	23,999,538.21
713	Other current assets	350,366.91
	Total current assets	67,836,401.51
	SPECIAL FUNDS	
715	Sinking funds	544,920.80
716	Capital and other reserve funds	2,191,318.60
	Total special funds	2,736,239.40
	INVESTMENTS	
721	Investments in affiliated companies -	
	(a) Stocks	4,728,006.33
	(d) Unsecured notes	2,690,007.10
	(e) Investment advances	8,875,227.76
		16,293,241.19
722	Other investments -	
	(a) Stocks	7,969.39
	(b) Bonds	1,013,000.00
	(c) Other secured obligations	780,419.91
		1,801,389.30
723	Reserve for adjustment of investment in securities-Cr.	(71,775.00)
	Total investments	18,022,855.49
	PROPERTIES	
731	Road and equipment property -	
	Road	627,705,064.88
	Equipment	326,430,852.52
	General expenditures	38,539,223.06
		992,675,140.46
732	Improvements on leased property -	
	Road	604,699.20
	General expenditures	14,712.73
		619,411.93
733	Acquisition adjustment	(160,115,970.95)
734	Donations and grants-Cr.	(9,395,098.32)
	Total transportation property	823,783,483.12
735	Accrued depreciation - Road	(87,556,458.31)
	Accrued depreciation - Equipment	(150,662,655.68)
736	Amortization of defense projects-Road	(2,189,521.12)
	Amortization of defense projects-Equipment	(17,761,244.96)
	Total transportation property less recorded depreciation and amortization	565,613,603.05
737	Miscellaneous physical property	8,679,555.34
738	Accrued depreciation-Miscellaneous physical property	(2,758,369.18)
	Miscellaneous physical property less recorded depreciation	5,921,186.16
	Total properties less recorded depreciation and amortization	571,534,789.21

Acct. No.	LIABILITIES AND SHAREHOLDERS' EQUITY			
	CURRENT LIABILITIES			
752	Traffic and car-service balances - Cr.			$ 3,539,109.70
753	Audited accounts and wages payable			6,928,396.70
754	Miscellaneous accounts payable			2,586,128.65
755	Interest matured unpaid			3,716,432.85
756	Dividends matured unpaid			390,660.87
757	Unmatured interest accrued			4,207,107.60
758	Unmatured dividends declared			5,129,764.61
759	Accrued accounts payable			8,793,153.67
760	Federal income taxes accrued			551,793.12
761	Other taxes accrued			8,591,670.03
763	Other current liabilities			4,511,441.74
	Total current liabilities (exclusive of long-term debt due within one year)			48,945,659.54
	LONG-TERM DEBT DUE WITHIN ONE YEAR			
764	Equipment obligations			9,029,780.45
		Total Issued	Held by or for Company	
	LONG-TERM DEBT			
765	Funded debt unmatured	$212,204,800.00	$6,346,700.00	205,858,100.00
766	Equipment obligations	56,984,694.46	None	56,984,694.46
	Total long-term debt			262,842,794.46
	RESERVES			
773	Equalization reserves			67,500.00
774	Casualty and other reserves			8,092,486.83
	Total reserves			8,159,986.83
	OTHER LIABILITIES AND DEFERRED CREDITS			
782	Other liabilities			1,274,630.40
784	Other deferred credits			586,927.30
785	Accrued depreciation - leased property			314,054.51
	Total other liabilities and deferred credits			2,175,612.21
	SHAREHOLDERS' EQUITY			
791	Capital Stock (Par or stated value):			
	Common stock-no par value (stated value $100 per share)			212,321,400.00
	Preferred stock-par value $100 per share			51,865,200.00
	Total capital stock			264,186,600.00
	Retained income:			
797	Retained income - Appropriated			43,634,820.44

712	Material and supplies	23,999,538.21
713	Other current assets	350,366.91
	Total current assets	67,836,401.51
	SPECIAL FUNDS	
715	Sinking funds	544,920.80
716	Capital and other reserve funds	2,191,318.60
	Total special funds	2,736,239.40
	INVESTMENTS	
721	Investments in affiliated companies -	
	(a) Stocks	4,728,006.33
	(d) Unsecured notes	2,690,007.10
	(e) Investment advances	8,875,227.76
		16,293,241.19
722	Other investments -	
	(a) Stocks	7,969.39
	(b) Bonds	1,013,000.00
	(c) Other secured obligations	780,419.91
		1,801,389.30
723	Reserve for adjustment of investment in securities-Cr.	(71,775.00)
	Total investments	18,022,855.49
	PROPERTIES	
731	Road and equipment property -	
	Road	627,705,064.88
	Equipment	326,430,852.52
	General expenditures	38,539,223.06
		992,675,140.46
732	Improvements on leased property -	
	Road	604,699.20
	General expenditures	14,712.73
		619,411.93
733	Acquisition adjustment	(160,115,970.95)
734	Donations and grants-Cr.	(9,395,098.32)
	Total transportation property	823,783,483.12
735	Accrued depreciation - Road	(87,556,458.31)
	Accrued depreciation - Equipment	(150,662,655.68)
736	Amortization of defense projects-Road	(2,189,521.12)
	Amortization of defense projects-Equipment	(17,761,244.96)
	Total transportation property less recorded depreciation and amortization	565,613,603.05
737	Miscellaneous physical property	8,679,555.34
738	Accrued depreciation-Miscellaneous physical property	(2,758,369.18)
	Miscellaneous physical property less recorded depreciation	5,921,186.16
	Total properties less recorded depreciation and amortization	571,534,789.21
	OTHER ASSETS AND DEFERRED CHARGES	
741	Other Assets	1,400,996.16
742	Unamortized discount on long-term debt	1,028,004.14
743	Other deferred charges	1,302,311.99
	Total other assets and deferred charges	3,731,312.29
	Total Assets	$663,861,597.90

760	Federal income taxes accrued			551,793.12
761	Other taxes accrued			8,591,670.03
763	Other current liabilities			4,511,441.74
	Total current liabilities (exclusive of long-term debt due within one year)			48,945,659.54
	LONG-TERM DEBT DUE WITHIN ONE YEAR			
764	Equipment obligations			9,029,780.45
		Total Issued	Held by or for Company	
	LONG-TERM DEBT			
765	Funded debt unmatured	$212,204,800.00	$6,346,700.00	205,858,100.00
766	Equipment obligations	56,984,694.46	None	56,984,694.46
	Total long-term debt			262,842,794.46
	RESERVES			
773	Equalization reserves			67,500.00
774	Casualty and other reserves			8,092,486.83
	Total reserves			8,159,986.83
	OTHER LIABILITIES AND DEFERRED CREDITS			
782	Other liabilities			1,274,630.40
784	Other deferred credits			586,927.30
785	Accrued depreciation - leased property			314,054.51
	Total other liabilities and deferred credits			2,175,612.21
	SHAREHOLDERS' EQUITY			
791	Capital Stock (Par or stated value):			
	Common stock-no par value (stated value $100 per share)			212,321,400.00
	Preferred stock-par value $100 per share			51,865,200.00
	Total capital stock			264,186,600.00
	Retained income:			
797	Retained income - Appropriated			43,434,820.44
798	Retained income - Unappropriated			25,086,343.97
	Total retained income			68,521,164.41
	Total shareholders' equity			332,707,764.41
	Total Liabilities and Shareholders' Equity			$663,861,597.90

The Company has assumed liability by agreement and/or otherwise, jointly with other railroad companies, in respect of the principal of obligations (not included as a Liability in the foregoing balance sheet) of companies in which it is interested, and which are essential to the operation of its railroad system, aggregating $117,235,000.00 as of March 31, 1958.

( ) Denote red figures.

Office of Vice President and Comptroller

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Finance and Accounting Department

INCOME ACCOUNT AND EARNED SURPLUS ACCOUNT FOR THE YEARS 1953 TO 1957

INCOME ACCOUNT

Acct. No.	Items	1953	1954	1955	1956	1957
	I. OPERATING INCOME					
	(A) RAILWAY OPERATING INCOME					
501	Railway operating revenues	$259,860,191.37	$237,744,639.41	$245,498,209.72	$253,860,546.44	$254,027,185.51
531	Railway operating expenses	218,183,759.67	199,410,603.99	204,641,341.90	210,746,257.33	208,178,810.44
	Net revenue from railway operations	41,676,431.70	38,334,035.42	40,856,867.82	43,114,289.11	45,848,375.07
532	Railway tax accruals	17,972,000.00	15,329,000.00	18,396,000.00	18,287,000.00	20,065,000.00
	Railway operating income	23,704,431.70	23,005,035.42	22,460,867.82	24,827,289.11	25,783,375.07
	(B) RENT INCOME					
504	Rent from locomotives	41,030.60	41,523.34	35,601.80	47,688.70	51,956.65
505	Rent from passenger-train cars	501,043.99	367,622.36	613,970.51	2,356,999.08	2,535,197.73
506	Rent from floating equipment	8,708.33	9,696.67	9,541.01	592.50	(766.67)
507	Rent from work equipment	8,851.49	14,204.52	8,510.21	5,582.32	9,090.46
508	Joint facility rent income	461,247.75	484,565.80	509,965.13	572,647.50	545,656.57
	Total rent income	1,020,882.16	917,612.69	1,177,588.66	2,983,510.10	3,141,134.74
	(C) RENTS PAYABLE					
536	Hire of freight cars - Debit Balance	6,685,639.14	5,979,382.08	3,883,009.43	4,465,160.16	6,828,548.93
537	Rent for locomotives	26,673.58	49,861.05	35,087.14	36,526.12	31,897.96
538	Rent for passenger-train cars	251,347.03	246,598.53	635,711.97	2,267,476.81	2,070,050.33
539	Rent for floating equipment	39,130.51	30,751.35	288,428.41	479,424.87	363,282.00
540	Rent for work equipment	1,723.26	147.26	1,698.13	1,876.14	1,208.43
541	Joint facility rents	3,057,112.48	3,047,389.47	3,013,996.11	3,215,379.36	3,210,828.79
	Total rents payable	10,061,626.00	9,354,129.74	7,857,931.19	10,469,843.46	12,505,816.44
	Net rents	(9,040,743.84)	(8,436,517.05)	(6,680,342.53)	(7,486,333.36)	(9,364,681.70)
	Net railway operating income	14,663,687.86	14,568,518.37	15,780,525.29	17,341,955.75	16,418,693.37
	II. OTHER INCOME					
509	Income from lease of road and equipment	286,184.82	27,757.08	28,403.40	27,792.60	27,792.60
510	Miscellaneous rent income	607,478.59	624,258.17	670,963.22	686,554.95	744,733.93
511	Income from nonoperating property	(13,042.25)	98,301.30	205,599.20	174,382.19	214,245.35
513	Dividend income	446,295.00	1,293,002.00	1,058,298.00	1,086,713.60	1,067,997.00
514	Interest income	2,568,367.39	1,943,751.43	3,438,446.72	862,047.17	975,019.27
516	Income from sinking and other reserve funds	25,422.61	3,997.17	412.24	-	-
517	Release of premiums on funded debt	20.07	4.01	-	-	-
519	Miscellaneous income	1,436.12	6,231.31	3,314.73	4,017.42	940.07
	Total other income	3,922,162.35	3,997,306.47	5,405,437.51	2,841,507.93	3,030,728.22
	Total income	18,585,850.21	18,565,824.84	21,185,962.80	20,186,441.68	19,449,421.59
	III. MISCELLANEOUS DEDUCTIONS FROM INCOME					
543	Miscellaneous rents	32,128.89	34,838.38	34,130.15	37,760.33	33,415.72
544	Miscellaneous tax accruals	53,046.38	55,953.06	58,506.21	65,209.52	62,494.36
549	Maintenance of investment organization	33.00	83.00	3.00	-	-
551	Miscellaneous income charges	113,279.70	78,295.22	106,481.53	205,143.82	144,378.20
	Total miscellaneous deductions	198,487.97	169,169.66	199,120.89	308,113.67	240,288.28
	Income available for fixed charges	18,387,062.24	18,396,652.88	20,986,841.91	19,878,328.01	19,209,133.31
	IV. FIXED CHARGES					
542	Rent for leased road and equipment	708.00	708.00	708.00	708.00	708.00
546	Interest on funded debt:					
	(a) Fixed interest not in default:					
	First mortgage 4% bonds, Series A	2,226,551.32	2,218,279.89	2,211,230.23	2,197,321.77	2,175,858.30
	Modified bonds of C.T.H.& S.E. Ry.Co.	579,306.29	575,070.44	569,612.70	564,872.00	557,784.12
	Equipment obligations	1,530,793.53	1,722,488.47	1,835,066.05	1,875,761.48	1,910,857.20
547	Interest on unfunded debt	117.57	1,062.14	483.88	96.52	359.93
548	Amortization of discount on funded debt	77,889.74	75,238.26	79,090.13	77,791.25	85,629.24
	Total fixed charges	4,415,366.45	4,592,847.20	4,696,190.99	4,716,551.02	4,731,196.79
	Income after fixed charges	13,971,695.79	13,803,805.68	16,290,650.92	15,161,776.99	14,477,936.52
	V. OTHER DEDUCTIONS					
546	Interest on funded debt:					
	(c) Contingent interest:					
	General mortgage 4-1/2% income bonds, series A	2,050,397.49	1,996,239.51	1,873,444.53	1,817,683.91	1,734,893.89
	General mortgage 4-1/2% convertible income bonds, series B	1,592,323.39	1,592,174.80	1,592,022.20	1,591,931.67	1,591,827.40
	Five per cent income debentures, series A	-	-	2,985,000.00	2,962,500.00	2,932,500.00
	Modified bonds of C.T.H.& S.E. Ry.Co.	315,957.00	310,932.00	307,902.00	303,746.99	302,367.00
	Total other deductions	3,958,677.88	3,899,346.31	6,758,368.73	6,675,882.57	6,561,588.29
	Net income after fixed charges and other deductions	10,013,017.91	9,904,459.37	9,532,282.19	8,485,894.42	7,916,348.23
	VI. DISPOSITION OF NET INCOME					
552	Income applied to sinking and other reserve funds:					
	(c) Sinking funds:					
	First mortgage 4% bonds, series A	211,611.75	220,267.75	229,363.75	238,543.75	248,607.75
	General mortgage 4-1/2% bonds, series A and B	543,393.50	543,393.50	543,393.50	543,393.50	543,393.50
	Five per cent income debentures, series A	-	-	207,140.00	189,868.75	171,750.00
	Total appropriations of income	755,005.25	763,661.25	979,897.25	971,806.00	963,751.25
	Remainder of Net Income	$ 9,258,012.66	$ 9,140,798.12	$ 8,552,384.94	$ 7,514,108.42	$ 6,952,596.98

EARNED SURPLUS ACCOUNT

CREDITS

Fol. 1041

	Railway operating income	23,704,431.70	23,005,035.12	22,460,887.82	24,827,287.11	25,783,375.07
	(B) RENT INCOME					
504	Rent from locomotives	41,030.60	41,523.34	35,601.80	47,688.70	51,956.65
505	Rent from passenger-train cars	501,043.99	367,622.36	613,970.51	2,356,999.08	2,535,197.73
506a	Rent from floating equipment	8,708.33	9,696.67	9,541.01	592.50	(766.67)
507	Rent from work equipment	8,851.49	14,204.52	8,510.21	5,582.32	9,090.46
508	Joint facility rent income	461,247.75	484,565.80	509,965.13	572,647.50	545,656.57
	Total rent income	1,020,882.16	917,612.69	1,177,588.66	2,983,510.10	3,141,134.74
	(C) RENTS PAYABLE					
536	Hire of freight cars - Debit Balance	6,685,639.14	5,979,382.08	3,883,009.43	4,465,160.16	6,828,548.93
537	Rent for locomotives	26,673.58	49,861.05	35,087.14	36,526.12	31,897.96
538	Rent for passenger-train cars	251,347.03	246,598.53	635,711.97	2,267,476.81	2,070,050.33
539	Rent for floating equipment	39,130.51	30,751.35	288,428.41	479,424.87	363,282.00
540	Rent for work equipment	1,723.26	147.26	1,698.13	1,876.14	1,208.43
541	Joint facility rents	3,097,112.48	3,047,389.47	3,013,996.11	3,215,379.36	3,210,828.79
	Total rents payable	10,061,626.00	9,354,129.74	7,857,931.19	10,465,843.46	12,505,816.44
	Net rents	(9,040,743.84)	(8,436,517.05)	(6,680,342.53)	(7,482,333.36)	(9,364,681.70)
	Net railway operating income	14,663,687.86	14,568,518.07	15,780,545.29	17,344,953.75	16,418,693.37
	II. OTHER INCOME					
509	Income from lease of road and equipment	286,184.82	27,757.08	28,403.40	27,792.60	27,792.60
510	Miscellaneous rent income	607,478.59	624,298.17	670,963.22	686,554.95	744,733.93
511	Income from nonoperating property	(13,042.25)	98,301.30	205,999.20	174,382.19	214,245.35
513	Dividend income	446,295.00	1,293,002.00	1,058,298.00	1,086,713.60	1,067,997.00
514	Interest income	2,568,367.39	1,943,751.43	3,438,446.72	862,047.17	975,019.27
516	Income from sinking and other reserve funds	25,422.61	3,997.17	412.24	-	-
517	Release of premiums on funded debt	20.07	4.01	-	-	-
519	Miscellaneous income	1,436.12	6,293.31	1,314.73	4,017.42	940.07
	Total other income	3,922,162.35	3,997,304.47	5,403,837.51	2,841,507.93	3,030,728.22
	Total income	18,585,850.21	18,565,822.54	21,185,962.80	20,186,461.68	19,449,421.59
	III. MISCELLANEOUS DEDUCTIONS FROM INCOME					
543	Miscellaneous rents	32,128.89	34,838.38	34,130.15	37,760.33	33,415.72
544	Miscellaneous tax accruals	53,046.38	55,953.06	58,506.21	65,209.52	62,494.36
549	Maintenance of investment organization	33.00	83.00	3.00	-	-
551	Miscellaneous income charges	113,579.70	78,295.22	106,481.53	205,143.82	144,378.20
	Total miscellaneous deductions	198,787.97	169,169.66	199,120.89	308,113.67	240,288.28
	Income available for fixed charges	18,387,062.24	18,396,652.88	20,986,841.91	19,878,348.01	19,209,133.31
	IV. FIXED CHARGES					
542	Rent for leased road and equipment	708.00	708.00	708.00	708.00	708.00
546	Interest on funded debt:					
	(a) Fixed interest not in default:					
	First mortgage 4% bonds, Series A	2,226,551.38	2,218,279.89	2,211,230.23	2,197,321.77	2,175,898.30
	Modified bonds of C.T.H.& S.E. Ry.Co.	579,306.29	575,070.44	569,612.70	564,872.00	557,784.12
	Equipment obligations	1,530,793.53	1,722,488.47	1,835,066.05	1,875,761.48	1,910,857.20
547	Interest on unfunded debt	117.57	1,062.14	483.88	96.52	399.93
548	Amortization of discount on funded debt	77,889.74	75,238.26	79,090.13	77,791.25	85,629.24
	Total fixed charges	4,415,366.49	4,592,847.20	4,696,190.99	4,716,551.02	4,731,276.79
	Income after fixed charges	13,971,695.75	13,803,805.68	16,290,650.92	15,161,796.99	14,477,856.52
	V. OTHER DEDUCTIONS					
546	Interest on funded debt:					
	(c) Contingent interest:					
	General mortgage 4-1/2% income bonds, series A	2,050,397.49	1,996,239.51	1,873,444.53	1,817,683.91	1,734,893.89
	General mortgage 4-1/2% convertible income bonds, series B	1,592,323.39	1,592,174.80	1,592,022.20	1,591,931.67	1,591,827.40
	Five per cent income debentures, series A	-	-	2,985,000.00	2,962,500.00	2,932,500.00
	Modified bonds of C.T.H.& S.E. Ry.Co.	335,957.00	310,932.00	307,902.00	303,746.99	302,367.00
	Total other deductions	3,978,677.88	3,899,346.31	6,758,368.73	6,675,862.57	6,561,588.29
	Net income after fixed charges and other deductions	10,013,017.91	9,904,459.37	9,532,282.19	8,485,934.42	7,916,268.23
	VI. DISPOSITION OF NET INCOME					
552	Income applied to sinking and other reserve funds:					
	(c) Sinking funds:					
	First mortgage 4% bonds, series A	211,611.75	220,267.75	229,363.75	238,543.75	248,607.75
	General mortgage 4-1/2% bonds, series A and B	543,393.50	543,393.50	543,393.50	543,393.50	543,393.50
	Five per cent income debentures, series A	-	-	207,140.00	189,868.75	171,750.00
	Total appropriations of income	755,005.25	763,661.25	979,897.25	971,806.00	963,751.25
	Remainder of Net Income	$ 9,258,012.66	$ 9,140,798.12	$ (8,552,384.94)	$ 7,514,108.42	$ 6,952,516.98
	EARNED SURPLUS ACCOUNT					
	CREDITS					
601	Credit balance at beginning of year	$ 37,349,700.52	$ 37,344,397.24	$ 35,419,134.02	$ 35,385,618.92	$ 34,347,919.16
602	Credit balance transferred from income	9,258,012.66	9,140,798.12	8,552,384.94	7,514,108.42	6,952,596.98
607	Miscellaneous credits	2,571,216.55	3,579,019.77	4,696,707.40	3,810,734.11	4,493,028.02
	Total credits	49,178,929.73	50,064,175.13	48,668,226.36	46,710,461.45	45,793,544.16
	DEBITS					
613	Surplus applied to sinking and other reserve funds	1,061,607.00	1,061,607.00	2,654,017.50	1,795,401.75	1,720,660.50
614	Dividend appropriations of surplus	7,716,468.42	7,716,468.42	10,901,288.03	5,778,074.96	5,778,124.63
615	Surplus appropriated for investment in physical property	2,969,946.79	-	-	4,632,858.84	4,122,237.09
621	Miscellaneous debits	86,920.38	5,866,965.69	(272,698.09)	156,206.74	908,005.29
	Total debits	11,834,942.59	14,645,041.11	13,282,607.44	12,362,542.29	12,529,027.51
	Credit balance carried to Balance Sheet	$ 37,344,397.24	$ 35,419,134.02	$ 35,385,618.92	$ 34,347,919.16	$ 33,264,516.65

( ) Denotes red figures.

Office of Vice President and Comptroller

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CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Finance and Accounting Department

INCOME ACCOUNT AND RETAINED INCOME ACCOUNT FOR THE PERIOD JANUARY THROUGH MARCH 1958

INCOME ACCOUNT

Acct. No.	Items	January - March 1958
	I. OPERATING INCOME	
	(A) RAILWAY OPERATING INCOME	
501	Railway operating revenues	$ 55,337,320.53
531	Railway operating expenses	48,355,994.50
	Net revenue from railway operations	6,981,326.03
532	Railway tax accruals	4,644,000.00
	Railway operating income	2,337,326.03
	(B) RENT INCOME	
504	Rent from locomotives	11,646.91
505	Rent from passenger-train cars	502,425.82
506	Rent from floating equipment	-
507	Rent from work equipment	2,164.72
508	Joint facility rent income	131,906.26
	Total rent income	648,143.71
	(C) RENTS PAYABLE	
536	Hire of freight cars - Debit Balance	1,636,773.38
537	Rent for locomotives	7,834.08
538	Rent for passenger-train cars	453,154.74
539	Rent for floating equipment	82,658.00
540	Rent for work equipment	325.58
541	Joint facility rents	782,758.29
	Total rents payable	2,963,504.07
	Net rents	(2,315,360.36)
	Net railway operating income	21,965.67
	II. OTHER INCOME	
509	Income from lease of road and equipment	6,983.99
510	Miscellaneous rent income	171,661.74
511	Income from nonoperating property	82,347.23
513	Dividend income	9,795.30
514	Interest income	202,613.63
516	Income from sinking and other reserve funds	-
517	Release of premiums on funded debt	-
519	Miscellaneous income	575,866.38
	Total other income	1,049,268.27
	Total income	1,071,233.94
	III. MISCELLANEOUS DEDUCTIONS FROM INCOME	
543	Miscellaneous rents	12,943.52
544	Miscellaneous tax accruals	17,776.82
549	Maintenance of investment organization	-
551	Miscellaneous income charges	34,369.33
	Total miscellaneous deductions	65,089.67
	Income available for fixed charges	1,006,144.27
	IV. FIXED CHARGES	
542	Rent for leased road and equipment	-
546	Interest on funded debt:	
	(a) Fixed interest not in default:	
	Fixed mortgage 4% bonds, series A	541,214.00
	Modified bonds of C.T.H.& S.E. Ry. Co.	138,542.86
	Equipment obligations	315,297.47
547	Interest on unfunded debt	115.08
548	Amortization of discount on funded debt	22,455.34
	Total fixed charges	1,217,624.75
	Income after fixed charges	(211,480.48)
	V. OTHER DEDUCTIONS	
546	Interest on funded debt:	
	(c) Contingent interest:	
	General mortgage 4-1/2% income bonds, series A	420,995.25
	General mortgage 4-1/2% convertible income bonds, series B	397,945.76
	Five per cent income debentures, series A	735,000.00
	Modified bonds of C.T.H.& S.E. Ry. Co.	75,234.25
	Total other deductions	1,629,195.26
	Net income after fixed charges and other deductions	(1,840,675.74)
	VI. DISPOSITION OF NET INCOME	
552	Income applied to sinking and other reserve funds:	
	(c) Sinking funds:	
	First mortgage 4% bonds, series A	-
	General mortgage 4-1/2% bonds, series A and B	-
	Five per cent income debentures, series A	-
	Total appropriations of income	-
	Remainder of Net Income	$ (1,840,675.74)

RETAINED INCOME

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	Railway tax accruals	4,644,000.00
	Railway operating income	2,337,326.03
	(B) RENT INCOME	
504	Rent from locomotives	11,646.91
505	Rent from passenger-train cars	502,425.82
506	Rent from floating equipment	-
507	Rent from work equipment	2,164.72
508	Joint facility rent income	131,906.26
	Total rent income	648,143.71
	(C) RENTS PAYABLE	
536	Hire of freight cars - Debit Balance	1,636,773.38
537	Rent for locomotives	7,834.08
538	Rent for passenger-train cars	453,154.74
539	Rent for floating equipment	82,658.00
540	Rent for work equipment	325.58
541	Joint facility rents	782,758.29
	Total rents payable	2,963,504.07
	Net rents	(2,315,360.36)
	Net railway operating income	21,965.67
	II. OTHER INCOME	
509	Income from lease of road and equipment	6,983.99
510	Miscellaneous rent income	171,661.74
511	Income from nonoperating property	82,347.23
513	Dividend income	9,795.30
514	Interest income	202,613.63
516	Income from sinking and other reserve funds	-
517	Release of premiums on funded debt	-
519	Miscellaneous income	575,866.38
	Total other income	1,049,268.27
	Total income	1,071,233.94
	III. MISCELLANEOUS DEDUCTIONS FROM INCOME	
543	Miscellaneous rents	12,943.52
544	Miscellaneous tax accruals	17,776.82
549	Maintenance of investment organization	-
551	Miscellaneous income charges	34,369.33
	Total miscellaneous deductions	65,089.67
	Income available for fixed charges	1,006,144.27
	IV. FIXED CHARGES	
542	Rent for leased road and equipment	-
546	Interest on funded debt:	
	(a) Fixed interest not in default:	
	Fixed mortgage 4% bonds, series A	541,214.00
	Modified bonds of C.T.H.& S.E. Ry. Co.	138,542.86
	Equipment obligations	515,297.47
547	Interest on unfunded debt	.115.08
548	Amortization of discount on funded debt	22,455.34
	Total fixed charges	1,217,624.75
	Income after fixed charges	(211,480.48)
	V. OTHER DEDUCTIONS	
546	Interest on funded debt:	
	(c) Contingent interest:	
	General mortgage 4-1/2% income bonds, series A	420,995.25
	General mortgage 4-1/2% convertible income bonds, series B	397,945.76
	Five per cent income debentures, series A	735,000.00
	Modified bonds of C.T.H.& S.E. Ry. Co.	75,254.25
	Total other deductions	1,629,195.26
	Net income after fixed charges and other deductions	(1,840,675.74)
	VI. DISPOSITION OF NET INCOME	
552	Income applied to sinking and other reserve funds:	
	(c) Sinking funds:	
	First mortgage 4% bonds, series A	-
	General mortgage 4-1/2% bonds, series A and B	-
	Five per cent income debentures, series A	-
	Total appropriations of income	-
	Remainder of Net Income	$ (1,840,675.74)

RETAINED INCOME

	CREDITS	
601	Credit balance at beginning of year	$ 33,264,516.65
602	Credit balance transferred from income	-
605	Profit from Company Bonds reacquired	12,163.75
606	Other credits to retained income	59,812.50
	Total credits	33,336,492.90
	DEBITS	
612	Debit balance transferred from income	1,840,675.74
616	Other debits to retained income	556,022.53
617	Federal income tax assignable to retained income	624,000.00
620	Appropriations for sinking and other reserve funds	1,592,410.50
622	Appropriations released	(2,141,099.45)
623	Dividends	5,778,079.61
	Total debits	8,250,148.93
	Credit balance carried to Balance Sheet	$ 25,086,343.97

( ) Denote red figures.

Office of Vice President and Comptroller

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
Balance Sheet - March 31, 1958 [fol: 106]

ICC Account	ASSETS		
	Current Assets		
701	Cash	$ 580,606	
702	Temporary cash investments	299,389	
706	Net Bal. Receivable-Agents & Cond.	18,527	
707	Miscellaneous accounts receivable	39,195	
709	Accrued accounts receivable	37,018	
710	Working fund advances	90	
711	Prepayments	30,201	
712	Material & Supplies	1,210,601	
713	Other current assets	140	
	Total current assets		2,215,767
	Investments		
721	Investment in affiliated companies (Railway Express Agency)	29,016	
	Total investments		29,016
	Properties		
731	Road and equipment property	20,835,655	
734	Donations and grants - Cr.	172,895	
	Total transportation property	20,662,760	
735	Accrued depreciation-road and equipment - Cr.	8,230,029	
736	Amortization of defense projects - Road and equipment - Cr.	361,604	
	Cr-	8,591,633	
	Total transportation property-less depreciation and amortization		12,071,127
737	Miscellaneous physical property	43,264	
738	Accrued depr.-Misc. physical property-cr.	3,797	
	Misc. phys. property less depreciation		39,467
	Total properties less recorded depr. and amortization		12,110,594

ICC Account	LIABILITIES AND SHREHOLD...	
	Current Liabilities	
751	Loans and notes payable	
752	Traffic & car service bal. Cr.	
753	Audited accounts wages payable	
754	Miscellaneous accounts payable	
757	Unmatured interest accrued	
759	Accrued accounts payable	
760	Federal income taxes	
761	Other taxes accrued	
763	Other current liabilities	
	Total current liabilities	
	Long Term Debt	
765	Funded debt unmatured	
766	Equipment obligations	
	Total long term debt	
	Other Liabilities and Deferred Credits	
782	Other liabilities	
	Total other liabilities and deferred credits	
	Shareholders' Equity	
791	Capital stock issued	
796	Other capital surplus	
798	Retained income-unappropriated	
	Total shareholders' equity	
	Total Liabilities and Shareh... Equity	

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
Balance Sheet - March 31, 1958 [fol. 106]

ASSETS		
...t Assets		
...y cash investments	$ 580,606	
... Receivable-Agents & Cond.	18,527	
...neous accounts receivable	39,195	
...accounts receivable	37,018	
...fund advances	90	
...nts	30,201	
... & Supplies	1,210,601	
...rrent assets	140	
... current assets		2,215,767
...ments		
...nt in affiliated companies ... Express Agency)	29,016	
... investments		29,016
...ties		
... equipment property	20,835,655	
...s and grants - Cr.	172,895	
... transportation property	20,662,760	
...depreciation-road and equip-...r.	8,230,029	
...tion of defense projects - ... equipment - Cr.	361,604	
Cr-	8,591,633	
...ansportation property-less ...tion and amortization		12,071,127
...neous physical property	43,264	
...depr.-Misc. physical property-cr.	3,797	
...ys. property less depreciation		39,467
... properties less recorded depr. ...mortization		12,110,594
Assets and Deferred Charges		

ICC Account	LIABILITIES AND SHREHOLDERS' EQUITY		
	Current Liabilities		
751	Loans and notes payable	$ 6,250	
752	Traffic & car service bal. Cr.	30,645	
753	Audited accounts wages payable	74,079	
754	Miscellaneous accounts payable	26,582	
757	Unmatured interest accrued	8,360	
759	Accrued accounts payable	12,575	
760	Federal income taxes	343,054	
761	Other taxes accrued	420,673	
763	Other current liabilities	9,388	
	Total current liabilities		931,606
	Long Term Debt		
765	Funded debt unmatured	93,750	
766	Equipment obligations	1,765,500	
	Total long term debt		1,859,250
	Other Liabilities and Deferred Credits		
782	Other liabilities	9,704	
	Total other liabilities and deferred credits		9,704
	Shareholders' Equity		
791	Capital stock issued	4,284,000	
796	Other capital surplus	11,111	
798	Retained income-unappropriated	7,762,110	
	Total shareholders' equity		12,057,221
	Total Liabilities and Shareholders' Equity		$ 14,857,781

Account			
	Current Assets		
701	Cash	$ 580,606	
702	Temporary cash investments	299,389	
706	Net Bal. Receivable-Agents & Cond.	18,527	
707	Miscellaneous accounts receivable	39,195	
709	Accrued accounts receivable	37,018	
710	Working fund advances	90	
711	Prepayments	30,201	
712	Material & Supplies	1,210,601	
713	Other current assets	140	
	Total current assets		2,215,767
	Investments		
721	Investment in affiliated companies (Railway Express Agency)	29,016	
	Total investments		29,016
	Properties		
731	Road and equipment property	20,835,655	
734	Donations and grants - Cr.	172,895	
	Total transportation property	20,662,760	
735	Accrued depreciation-road and equipment - Cr.	8,230,029	
736	Amortization of defense projects - Road and equipment - Cr.	361,604	
	Cr-	8,591,633	
	Total transportation property-less depreciation and amortization		12,071,127
737	Miscellaneous physical property	43,264	
738	Accrued depr.-Misc. physical property-cr.	3,797	
	Misc. phys. property less depreciation		39,467
	Total properties less recorded depr. and amortization		12,110,594
	Other Assets and Deferred Charges		
741	Other assets	102,069	
743	Other deferred charges	400,335	
	Total other assets and deferred charges		502,404
	Total Assets		$ 14,857,781

Account		
	Current Liabilities	
751	Loans and notes payable	
752	Traffic & car service bal. Cr.	
753	Audited accounts wages payable	
754	Miscellaneous accounts payable	
757	Unmatured interest accrued	
759	Accrued accounts payable	
760	Federal income taxes	
761	Other taxes accrued	
763	Other current liabilities	
	Total current liabilities	
	Long Term Debt	
765	Funded debt unmatured	
766	Equipment obligations	
	Total long term debt	
	Other Liabilities and Deferred Credits	
782	Other liabilities	
	Total other liabilities and deferred credits	
	Shareholders' Equity	
791	Capital stock issued	
796	Other capital surplus	
798	Retained income-unappropriated	
	Total shareholders' equity	
	Total Liabilities and Shareho Equity	

	Assets		
		$ 580,606	
	cash investments	299,389	
	eceivable-Agents & Cond.	18,527	
	ous accounts receivable	39,195	
	counts receivable	37,018	
	nd advances	90	
	ts	30,201	
	Supplies	1,210,601	
	ent assets	140	
	urrent assets		2,215,767
	nts		
	in affiliated companies	29,016	
	xpress Agency)		
	nvestments		29,016
	es		
	quipment property	20,835,655	
	and grants - Cr.	172,895	
	ransportation property	20,662,760	
	preciation-road and equip-	8,230,029	
	on of defense projects - quipment - Cr.	361,604	
	Cr-	8,591,633	
	sportation property-less on and amortization		12,071,127
	ous physical property	43,264	
	pr.-Misc. physical property-cr.	3,797	
	. property less depreciation		39,467
	roperties less recorded depr. rtization		12,110,594
	sets and Deferred Charges		
	ts	102,069	
	rred charges	400,335	
	ther assets and deferred		502,404
	ssets		$ 14,857,781

Account			
	Current Liabilities		
751	Loans and notes payable	$ 6,250	
752	Traffic & car service bal. Cr.	30,645	
753	Audited accounts wages payable	74,079	
754	Miscellaneous accounts payable	26,582	
757	Unmatured interest accrued	8,360	
759	Accrued accounts payable	12,575	
760	Federal income taxes	343,054	
761	Other taxes accrued	420,673	
763	Other current liabilities	9,388	
	Total current liabilities		931,606
	Long Term Debt		
765	Funded debt unmatured	93,750	
766	Equipment obligations	1,765,500	
	Total long term debt		1,859,250
	Other Liabilities and Deferred Credits		
782	Other liabilities	9,704	
	Total other liabilities and deferred credits		9,704
	Shareholders' Equity		
791	Capital stock issued	41,284,000	
796	Other capital surplus	11,111	
798	Retained income-unappropriated	7,762,110	
	Total shareholders' equity		12,057,221
	Total Liabilities and Shareholders' Equity		$ 14,857,781

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
INCOME ACCOUNT

For the years 1953 to 1957 inclusive and the 3 months ended March 31, 1958

I.C.C. Account	I. Operating Income A. Operating Income	1953	1954	1955	1956	1957
501	Railway operating revenues	$ 4,954,724	3,439,166	5,613,635	5,206,398	5,645,037
531	Railway operating expenses	2,940,550	2,445,742	2,981,226	3,054,333	3,383,124
	Net revenue from railway operations	2,014,174	993,424	2,632,409	2,152,065	2,261,913
532	Railway tax accruals	1,225,590	518,004	1,452,200	1,186,129	1,346,884
	Railway operating income	788,584	475,420	1,180,209	965,936	915,029
	B. Rent Income					
503	Hire of freight cars-credit balance	161,865	157,787	309,903	219,118	231,277
504	Rent from locomotives	20		1,041	276	
505	Rent from passenger train cars					
507	Rent from work equipment	3,320	733	1,213	2,587	470
508	Joint facility rent income	1,580	1,531	3,615	3,044	3,566
	Total rent income	166,785	160,051	315,772	225,025	235,213
	C. Rents Payable					
541	Joint facility rents	3,041	2,615	2,727	2,518	2,617
	Total rents payable	3,041	2,615	2,727	2,518	2,617
	Net rents	163,744	157,436	313,045	222,507	232,596
	Net operating income	952,328	632,856	1,493,254	1,188,443	1,147,625
	II Other Income					
510	Miscellaneous Rent Income	(166)	658	1,629	1,708	496
511	Income non-operating property	2,222	3,821	4,008	4,388	4,345
514	Income from funded securities	27,469	10,384	26,573	49,065	41,325
515	Income from unfunded securities and accounts					
519	Miscellaneous income	95			2	
520	Delayed income credits					
	Total other income	29,620	14,863	32,210	55,163	46,166
	Total income	981,948	647,719	1,525,464	1,243,606	1,193,791
	III Misc. Deduction from Income					
543	Miscellaneous rents	127	110	202	230	130
544	Miscellaneous tax accruals	1,199	1,446	1,342	1,264	1,381
551	Miscellaneous income charges	1,399	252	180	506	476
	Total miscellaneous deductions	2,725	1,808	1,724	2,000	1,987
	Income available for fixed charges	979,223	645,911	1,523,740	1,241,606	1,191,804
	IV Fixed Charges					
546	Interest on funded debt	31,979	33,308	29,086	25,333	35,90

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
INCOME ACCOUNT
For the years 1953 to 1957 inclusive and the 3 months ended March 31, 1958

..I.C.C. Account	..I. Operating Income ..A. Operating Income	1953	1954	1955	1956	1957	3 months ended Mar.31,1958
	..y operating revenues	$ 4,954,724	3,439,166	5,613,635	5,206,398	5,645,037	268,720
	..y operating expenses	2,940,550	2,445,742	2,981,226	3,054,333	3,383,124	648,229
	..revenue from railway operations	2,014,174	993,424	2,632,409	2,152,065	2,261,913	(379,509)
	..y tax accruals	1,225,590	518,004	1,452,200	1,186,129	1,346,884	127,195
	..way operating income	788,584	475,420	1,180,209	965,936	915,029	(506,704)
	..Rent Income						
	..f freight cars-credit balance	161,865	157,787	309,903	219,118	231,277	45,797
	..rom locomotives	20		1,041	276		
	..rom passenger train cars						
	..rom work equipment	3,320	733	1,213	2,587	470	13
	..facility rent income	1,580	1,531	3,615	3,044	3,566	303
	..l rent income	166,785	160,051	315,772	225,025	235,213	46,113
	..Rents Payable						
	..facility rents	3,041	2,615	2,727	2,518	2,617	415
	..l rents payable	3,041	2,615	2,727	2,518	2,617	415
	..rents	163,744	157,436	313,045	222,507	232,596	45,698
	..operating income	952,328	632,856	1,493,254	1,188,443	1,147,625	(461,006)
	..I Other Income						
	..laneous Rent Income	(166)	658	1,629	1,708	496	139
	..non-operating property	2,222	3,821	4,008	4,388	4,345	1,095
	..from funded securities	27,469	10,384	26,573	49,065	41,325	6,186
	..from unfunded securities and accounts						
	..laneous income	95			2		
	..d income credits						
	..l other income	29,620	14,863	32,210	55,163	46,166	7,420
	..l income	981,948	647,719	1,525,464	1,243,606	1,193,791	(453,586)
	..II Misc. Deduction from Income						
	..laneous rents	127	110	202	230	130	--
	..laneous tax accruals	1,199	1,446	1,342	1,264	1,381	--
	..laneous income charges	1,399	252	180	506	476	118
	..l miscellaneous deductions	2,725	1,808	1,724	2,000	1,987	118
	..e available for fixed charges	979,223	645,911	1,523,740	1,241,606	1,191,804	(453,704)
	..V Fixed Charges						

	B. Rent Income						
503	Hire of freight cars-credit balance	161,865	157,787	309,903	219,118	231,277	45,797
504	Rent from locomotives	20		1,041	276		
505	Rent from passenger train cars						
507	Rent from work equipment	3,320	733	1,213	2,587	470	13
508	Joint facility rent income	1,580	1,531	3,615	3,044	3,566	303
	Total rent income	166,785	160,051	315,772	225,025	235,213	46,113
	C. Rents Payable						
541	Joint facility rents	3,041	2,615	2,727	2,518	2,617	415
	Total rents payable	3,041	2,615	2,727	2,518	2,617	415
	Net rents	163,744	157,436	313,045	222,507	232,596	45,698
	Net operating income	952,328	632,856	1,493,254	1,188,443	1,147,625	(461,006)
	II Other Income						
510	Miscellaneous Rent Income	(166)	658	1,629	1,708	496	139
511	Income non-operating property	2,222	3,821	4,008	4,308	4,345	1,095
514	Income from funded securities	27,469	10,384	26,573	49,065	41,325	6,186
515	Income from unfunded securities and accounts						
519	Miscellaneous income	95			2		
520	Delayed income credits						
	Total other income	29,620	14,863	32,210	55,163	46,166	7,420
	Total income	981,948	647,719	1,525,464	1,243,606	1,193,791	(453,586)
	III Misc. Deduction from Income						
543	Miscellaneous rents	127	110	202	230	130	--
544	Miscellaneous tax accruals	1,199	1,446	1,342	1,264	1,381	--
551	Miscellaneous income charges	1,399	252	180	506	476	118
	Total miscellaneous deductions	2,725	1,808	1,724	2,000	1,987	118
	Income available for fixed charges	979,223	645,911	1,523,740	1,241,606	1,191,804	(453,704)
	IV Fixed Charges						
546	Interest on funded debt	31,979	33,308	29,086	25,333	35,909	17,700
547	Interest on unfunded debt	6,446	447	4,596			
548	Amortization of discount on funded debt	200				587	
	Total fixed charges	38,625	33,755	33,682	25,333	36,496	17,700
	Income after fixed charges	940,598	612,156	1,490,058	1,216,273	1,155,308	(471,404)
	VI Disposition of Net Income						
553	Dividend appropriation of income		224,910	353,430	374,850	385,560	--
	Total appropriation of income		224,910	353,430	374,850	385,560	--
602	Balance of income transferred to Earned Surplus	940,598	387,246	1,136,628	841,423	769,748	(471,404)

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY [fol. 108]

Profit and Loss Statement

For the years 1953 to 1957 inclusive and the 3 months ended March 31, 1958

		1953	1954	1955	1956	
	Balance at beginning of year	Cr.4,807,294	Cr.5,320,092	Cr.5,560,672	Cr.6,622,330	Cr.
	Credit balance transferred from income	" 940,598	" 387,246	" 1,136,628	" 841,423	"
(607)	Miscellaneous credits	" 600	" 3,276	"	" 75	
(614)	Dividend appropriations of surplus	Dr. 428,400	Dr. 149,940	Dr. 74,970		
(621)	Miscellaneous debits		Dr. 2		Dr. 27	Dr.
	Balance carried to balance sheet	Cr.5,320,092	Cr.5,560,672	Cr.6,622,330	Cr.7,463,801	Cr.

STATE OF MICHIGAN)
(SS
COUNTY OF MARQUETTE)

M.W. Rossway, being duly sworn, c
the Assistant Comptroller and Auditor
RAILROAD COMPANY; that he has examine
Income Statement and Profit and Loss S
are true and correct to the best of hi

(Signed) M.W. Rossway
Assistant Comptroller a

Subscribed and sworn to before me this
16th day of May, 1958.

A.E. Yelland
Notary Public

My Commission expires November 9, 1959.

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY [fol. 108]
Profit and Loss Statement
For the years 1953 to 1957 inclusive and the 3 months ended March 31, 1958

	1953	1954	1955	1956	1957	3 months ended Mar. 31, 1958
beginning of year	Cr.4,807,294	Cr.5,320,092	Cr.5,560,672	Cr.6,622,330	Cr.7,463,801	Cr.8,233,514
ance transferred from income	" 940,598	" 387,246	" 1,136,628	" 841,423	" 769,748	" 471,404
ous credits	" 600	" 3,276	"	" 75		
ppropriations of surplus	Dr. 428,400	Dr. 149,940	Dr. 74,970			
ous debits		Dr. 2		Dr. 27	Dr. 35	
rried to balance sheet	Cr.5,320,092	Cr.5,560,672	Cr.6,622,330	Cr.7,463,801	Cr.8,233,514	Cr.7,762,110

STATE OF MICHIGAN)
(SS
COUNTY OF MARQUETTE)

M.W. Rossway, being duly sworn, deposes and says that he is the Assistant Comptroller and Auditor of LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY; that he has examined the foregoing Balance Sheet, Income Statement and Profit and Loss Statement and that the same are true and correct to the best of his knowledge and belief.

(Signed) M.W. Rossway
Assistant Comptroller and Auditor

ibed and sworn to before me this
_day of May, 1958.

A.E. Yelland
Notary Public

ission expires November 9, 1959.

[fol. 109]

EXHIBIT G TO RETURN TO QUESTIONNAIRE

May 21, 1958

Opinion of Counsel

As Counsel for the Lake Superior & Ishpeming Railroad Company named in the foregoing application and immediately in charge of matters with respect thereto, I am familiar with the agreement attached to the return to the questionnaire and I am familiar also with the charter of the Lake Superior & Ishpeming Railroad Company.

In my opinion, applicant Lake Superior & Ishpeming Railroad Company possesses ample power to carry out the agreement, and the transaction described in the application meets with the requirements of the law.

/s/ B. H. DAVIDSON
Counsel
Lake Superior & Ishpeming
Railroad Company

[fol. 110]

EXHIBIT G-1 TO RETURN TO QUESTIONNAIRE

OPINION OF COUNSEL

I am Vice President and General Counsel of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, an Applicant in the foregoing proceeding, and I am familiar with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company's charter and its corporate powers thereunder.

It is my opinion that the construction and operations embraced in the instant application are within the charter powers of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

E. R. ECKERSALL (signed)
Vice President and General Counsel
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company

Chicago, Illinois
May 21, 1958

[fol. 111] *Duly sworn to by J. H. Kline and R. S. Stephenson, jurats omitted in printing.*

[fol. 114] Note: This application is filed supplemental to, and covers the same transaction as is involved in Finance Docket 20139.

[fol. 115]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20139

In the Matter of the Application of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company for Approval and Authorization of Operations by Each of said Railroads over Certain Trackage of the Other Pursuant to Section 5 (2)(a)(ii) of the Interstate Commerce Act.

SUPPLEMENTAL TO SECTION 1 (18) APPLICATION IN FINANCE DOCKET NO. 20139—Filed August 1, 1958

Now come Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company and respectively pray that the Commission approve and authorize under the provisions of Section 5 (2)(a)(ii) of the Interstate Commerce Act the joint use of certain trackage of each by the other, which trackage is hereinafter more specifically described; and for grounds of said application respectfully allege and show as follows:

Applicants now have pending before the Commission a Section 1 (18) application docketed under Finance Docket No. 20139 by which they seek a certificate that public convenience and necessity require operation by said applicants over a connection and interchange tracks by which their respective lines have been physically connected near Republic, Michigan. This operation will involve joint use of such trackage including also a segment of the main line track of the applicant, LS&I. Applicants have not deemed that authorization pursuant to the provisions of Section 5 (2) of

the Act is required by the Act; they make and file this application out of an abundance of caution to assure that all necessary action by the Commission for the consummation of the project involved be appropriately invoked.
[fol. 116] This application in F.D. 20139 was accompanied by a motion to dismiss in order to raise the jurisdictional question involved and a similar motion is being concurrently filed with this application.

(a) *Identification of applicant, or of each applicant, if there are two or more applicants, showing:*

1. Full and correct name of applicant and the business address of applicant (street and number, city, county and state).

Chicago, Milwaukee, St. Paul and Pacific Railroad Company,
516 West Jackson Boulevard
Chicago 6, Illinois

Lake Superior & Ishpeming Railroad Company
Marquette, Michigan

2. Whether applicant is an individual, firm, co-partnership, corporation, company, association, joint stock company, trustee, receiver, assignee, or other personal representative, and trade name or style, if any, under which applicant is doing business.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a Wisconsin corporation; it is commonly referred to as the Milwaukee Road and for convenience is so designated herein.
Lake Superior & Ishpeming Railroad Company is a Michigan corporation and is designated herein as LS&I.

3. Whether applicant is a carrier by railroad or an express company subject to Part I of the Act, or a water carrier subject to Part III of the Act, or a person which is not a carrier subject to the Act.

Applicants are carriers by railroad subject to Part I of the Interstate Commerce Act.

4. State or States in which any part of the property of the carrier or carriers involved is situated, and, in case of a water carrier, in which any port served by such carrier is located.

The Milwaukee Road is authorized to operate, and is operating, in the following states: Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington and Wisconsin.

[fol. 117] LS&I operates within the State of Michigan.

5. The name, title, and business address of the officer or officers to whom correspondence with respect to the application should be addressed.

J. H. Kline, President and General Manager,
Lake Superior & Ishpeming Railroad Company,
Marquette, Michigan

R. K. Merrill, Commerce Counsel
888 Union Station Building
516 West Jackson Boulevard
Chicago 6, Illinois

(b) *Information respecting applicant, or each applicant, if there are two or more applicants, as follows*:

1. If applicant is a corporation:

(i) Date of incorporation and Government, State, or Territory of Incorporation.

The LS&I was incorporated in the State of Michigan on August 17, 1923.

The Milwaukee Road was incorporated in State of Wisconsin March 31, 1927.

(ii) Name and business address of directors.

The Milwaukee Road Directors

John D. Allen	1448 N. Lake Shore Drive	Chicago 10, Illinois
James M. Barker	7447 Skokie Blvd.	Skokie, Illinois
Leo T. Crowley	874 Union Station	Chicago 6, Illinois
Walter J. Cummings	231 South LaSalle Street	Chicago 4, Illinois
John B. Gallagher	P.O. Box 272	Lake Forest, Illinois
Joshua Green	1414 Fourth Avenue	Seattle 1, Washington
Arnold B. Keller	180 North Michigan Avenue	Chicago 1, Illinois
J. Patrick Lannon	135 South LaSalle Street	Chicago 3, Illinois
Walter J. Mahoney	Box 866	Sioux City, Iowa
James D. Norris	307 West 49th Street	New York, New York
William L. O'Brien	2850 South Michigan Avenue	Chicago 16, Illinois
Philip W. Pillsbury	608 Second Avenue, South	Minneapolis 2, Minn.
Louis Quarles	411 East Mason Street	Milwaukee, Wisconsin
William J. Quinn	848 Union Station	Chicago 6, Illinois
Franklin B. Schmick	135 South LaSalle Street	Chicago 3, Illinois
William J. Sinek	Room 1377, 33 S. Clark Street	Chicago, Illinois
John P. Wagner	179 East Lake Shore Drive	Chicago 11, Illinois
Arthur M. Wirtz	3180 North Sheridan Road	Chicago 14, Illinois
William J. Froelich	231 S. LaSalle Street	Chicago 4, Illinois

[fol. 118] L&SI Directors

William Beerman, Munising, Michigan
John M. Bush, Ann Arbor, Michigan
William W. Hendrikson, Marquette, Michigan
James H. Kline, Marquette, Michigan
Ernest L. Pearce, Marquette, Michigan
August Syverson, Marquette, Michigan

(iii) Name, title and business address of officers.

Milwaukee Road Officers

L. T. Crowley, Chairman of the Board
874 Union Station, Chicago, Illinois

W. J. Quinn, President
848 Union Station

E. R. Eckersall, Vice President and General Counsel
888 Union Station, Chicago, Illinois

R. S. Stephenson, Vice President and Comptroller
744 Union Station, Chicago, Illinois

F. G. McGinn, Vice President—Operations
856 Union Station, Chicago, Illinois

W. W. Kremer, Vice President—Traffic
774 Union Station, Chicago, Illinois

L. H. Dugan, Vice President and Western Counsel
608 White Building, Seattle, Washington

P. H. Draver, Vice President-Industrial Development
286 Union Station, Chicago, Illinois

E. O. Schiewe, General Solicitor
888 Union Station, Chicago, Illinois

J. J. Roche, Secretary
256 Union Station, Chicago, Illinois

C. T. Lannon, Treasurer
732 Union Station, Chicago, Illinois

LS&I Officers

August Syverson, Honorary Chairman of the Board, Marquette, Michigan
James H. Kline, President and General Manager, Marquette, Michigan
W. Arthur Zerbel, Assist. to the President, Marquette, Michigan
Arnold V. Yelland, Secretary, Marquette, Michigan
Melvin W. Rossway, Treasurer and Comptroller, Marquette, Michigan

[fol. 119]

(iv) Name and business address of 10 principal stockholders as of last record date and their respective holdings.

The Milwaukee Road as of December 31, 1957

	Total	Common	Preferred
Merrill, Lynch, Pierce, Fenner and Smith 70 Pine St., New York, N.Y.	158,553	129,098	29,455
E.F. Hutton & Co. 61 Broadway, New York 6, N.Y.	66,582	63,247	3,335
Bache & Co. 36 Wall St., New York 5, N.Y.	58,780	52,240	6,540
Francis I. Dupont & Co. 1 Wall St., New York 5, N.Y.	54,001	48,363	5,638
Carl M. Loeb, Rhoades & Co. 42 Wall St., New York 5, N.Y.	49,127	45,937	3,190
O'Neill & Co. 20 Exchange Pl., New York 5, N.Y.	48,000	—	48,000
Thomson & McKinnon 11 Wall St., New York 5, N.Y.	35,626	21,275	14,351
Reynolds & Co. 120 Broad St., New York 5, N.Y.	33,989	32,839	1,150
Paine Webber, Jackson & Curtis 25 Broad St., New York 4, N.Y.	32,537	28,659	3,878
Walston & Co. 120 Broad St., New York 5, N.Y.	30,412	29,021	1,391

LS&I as of June 24, 1958

		No. of Shares
The Cleveland Cliffs Iron Co.	Cleveland, Ohio	161,175
A.A. Welsh & Co.	Cleveland, Ohio	4,052
Mary L. Robinson	Pittsburgh, Pa.	1,490
Sheldon & Company	Cleveland, Ohio	1,410
Elaine Haggenmiller	Hibbing, Minnesota	1,334
Helen G. Perry	Shaker Heights, Ohio	1,170
John M. Bush	Ann Arbor, Michigan	1,160
Ralph J. Haggenmiller	Hibbing, Minnesota	1,151
Mrs. G. Syverson	Marquette, Michigan	1,145
Helen W. Greene	Cleveland, Ohio	1,000

[fol. 120] 2. If applicant is a copartnership:

Not applicable

3. If applicant is an association or other form of organization, except a corporation:

Not applicable.

4. If applicant is a trustee, receiver, assignee, or a personal representative of the real party in interest:

Not applicable

5. If applicant is not a carrier:

Not applicable

6. The length of time applicant has been continuously engaged in the type of business in which it is now engaged; and, if applicant is not a carrier, particulars of its present and prospective activities which have or may have a relation to transportation subject to the Interstate Commerce Act or facilities used therein.

The Milwaukee Road has been continuously engaged in railroad operations since the date of its incorporation. LS&I has been similarly engaged continuously since January 1, 1924.

7. Whether or not applicant is controlled by any other corporation or corporations, and, if such control is held, state the name of the controlling corporation or

corporations, the form of control, whether sole or joint, direct or indirect, and its extent.

The Milwaukee Road is not controlled by any corporation or corporations.

The Cleveland Cliffs Iron Company, Union Commerce Building, owns 75.245 per cent of the common stock of LS&I.

8. The measure of control or ownership, if any, now exercised by applicant over any carrier corporation subject to the Interstate Commerce Act, or over the properties of such corporation.

The Milwaukee Road

The Milwaukee Road owns stock in the following corporations as shown:

(1) Chicago, Terre Haute and South Eastern Railway Company: 97.67% of outstanding capital stock. Considering voting rights of this company's income bonds extent of control is 52.93%.

[fol. 121] (2) Chicago Union Station Company: 25% of the capital stock of, and jointly with others, controls this company.

(3) Davenport, Rock Island and North Western Railway Company: 50% and the Chicago, Burlington and Quincy Railroad Company owns 50% of the capital stock.

(4) Des Moines Union Railway Company: 50% and the Wabash Railroad Company owns 50% of the capital stock.

(5) Indiana Harbor Belt Railroad Company: 20% of the capital stock of, and jointly with others controls this company.

(6) Kansas City Terminal Railway Company: 8⅓% of the capital stock and jointly with eleven other carriers by railroad controls this company.

(7) Minneapolis Eastern Railway Company: 50% and the Chicago, St. Paul, Minneapolis and Omaha Railway Company owns 50% of the capital stock.

(8) Minnesota Transfer Railway Company: 11 1/9% of the capital stock of, and jointly with eight other carriers by railroad controls this company.

(9) Railway Express Agency, Inc.: 2.6% of the capital stock.

(10) St. Paul Union Depot Company: 12.5% of the capital stock and jointly with seven other carriers by railroad controls this company.

(11) Pullman Company: 1.28% of the capital stock and various other railroads own 98.72% of the stock of this company.

LS&I

LS&I does not own, control or operate the properties of any other corporation.

9. If applicant, or the real party in interest, is part of a system or group of corporations or other persons, the relationship of the applicant, or of the real party in interest, to the members of such system or group, including the form and extent of such relationship, direct or indirect.

The Milwaukee Road is not part of a system or group of corporations or other persons.

[fol. 122] Although a majority of its capital stock is owned by the Cleveland Cliffs Iron Company, the LS&I is not a part of a system or group of corporations or other persons. All matters not requiring stockholder authorization or approval are determined by LS&I officers and directors at Marquette, Michigan.

10. Whether there are any intercorporate relationships, not disclosed in responses to prior instructions, through holding companies, ownership or securities,

or otherwise, direct or indirect, between applicant and any carrier or person affiliated with any carrier, or between any person affiliated with applicant and any carrier or person affiliated with any carrier, at the time of making the application; if so, the nature and extent of such relationship, and, if applicant owns securities of a carrier corporation or corporations subject to the act, the name of the corporation, a description of the securities, and the par value of each class of securities held.

The Milwaukee Road owns securities of carrier corporations subject to the Interstate Commerce Act as follows:

Name of Carrier Corporation	Description of Security	Par Value
Chicago, Terre Haute and South Eastern Ry. Co.	Common Stock	$4,075,505
Chicago Union Station Co.	" "	700,000
Davenport, Rock Island and North Western Ry. Co	" "	1,500,000
DesMoines Union Ry. Co.	" "	200,000
Indiana Harbor Belt RR. Co.	" "	1,520,000
Kansas City Terminal Ry. Co.	" "	183,333
Kansas City Terminal Ry. Co.	Notes	38,007
Kansas, Oklahoma and Gulf Ry. Co.	Preferred Stock	7,300
Minneapolis, Eastern Ry. Co.	Common Stock	62,000
Minnesota Transfer Ry. Co.	" "	91,300
Railway Express Agency, Inc.	" "	26 shares without par value
St. Paul Union Depot Co.	" "	103,600
The Pullman Co.	" "	94,260

[fol. 123] LS&I owns one share of common stock, no par, of Railway Express Agency, Inc.

11. Whether any of the applicants or any of their affiliates have officers or directors in common with any other applicant or its affiliates; and, if so, a reference to the Commission's order, or orders, if any, authorizing the holding of such positions in common, with the names of such officers or directors and the position held in each corporation.

Not applicable, since there are none.

12. The amount of applicant's outstanding capital stock, by classes, and in connection therewith the par value of each share, its voting rights, if any, the total number of stockholders of record, and the voting power of all security holders.

The outstanding capital stock of the Milwaukee Road consists of 518,652 shares of preferred stock, par value $51,865,200 and 2,123,214 shares of common stock, par value $212,321,400. Each full share of such stock has the right to one vote. No voting rights are attached to any securities of said corporation other than its preferred and common stock. The total number of stockholders of record, as of December 31, 1957 was 14,671 and the voting power of all security holders 2,641,866 votes.

LS&I has only one class of capital stock outstanding consisting of 214,200 shares of common stock, each of $20 par value. Each share is entitled to one vote. The total number of stockholders is 480.

(c) *Information respecting the nature of the transaction proposed and the terms and conditions thereof as follows:*

1. The nature of the transaction, whether a consolidation or merger, or a purchase, lease, contract to operate properties, or any part thereof, of a carrier subject to Part I or Part III of the Act, or for acquisition of control of such carrier, or to acquire trackage rights over or joint ownership in, or joint use of, any railroad line or lines.

The nature of the transaction, authority for which is sought, is the acquisition by the Milwaukee of trackage rights to operate over 4,200 feet of the main track of the LS&I for the purpose of facilitating the interchange of cars between that company and the Milwaukee Railroad at [fol. 124] Republic Junction, Michigan, also and for the same purpose the acquisition of trackage rights by each of the applicants to operate over the connection and interchange tracks of the other which are more particularly described and defined in a proposed agreement, identified as Exhibit D attached to the Return to the Questionnaire in Finance Docket No. 20139.

2. Briefly, the terms and conditions of the contract or agreement pursuant to which the proposed transaction is to be effected, including the manner in which it is proposed to consummate the transaction and the consideration in money or otherwise, to be paid by applicant or applicants.

The proposed transaction is to be effected pursuant to the terms and conditions of the proposed agreement dated November 1, 1957 between the applicants, a copy of which agreement is filed with Finance Docket No. 20139 as Exhibit D to the Return to the Questionnaire. Said agreement provides, among other things, that the LS&I grant to the Milwaukee Road trackage rights and the right to operate over that portion of the LS&I trackage referred to in Section (c)1. The agreement provides that the Milwaukee Road shall pay to the LS&I $25.00 per month for the use of this track to cover rental and maintenance expense

3. Whether there is any financial or other relationship, direct or indirect, not disclosed in responses to prior instructions, existing at the present time between applicant or applicants and the other party or parties to the transaction proposed; and, if so, a full explanation of such relationship.

No such financial or other relationship exists.

4. The route, termini, and mileage of the lines to be consolidated, merged, purchased, leased, operated,

or controlled, giving the principal points of interchange, with ports served in cases involving carriers subject to Part III of the Act, and with main line mileage and branch line mileage shown separately in case of railroad properties.

Answer under (c) 2 above.

[fol. 125] 5. Whether the property involved in the proposed transaction includes all the property of the applicants proposing a consolidation or merger, or of the carrier whose property it is proposed to purchase, lease, or operate, or control of which is proposed; and, if not, definitely what property is included in the proposed transaction.

The proposed transaction does not involve all of the property of either applicant. All that is involved are the connection, the interchange tracks, and a short segment of the LS&I main line near Republic, Mich., as shown on the map Exhibit "A" attached to Exhibit D Return to Questionnaire, in Finance Docket No. 20139.

6. Value of each of the properties involved in the proposed transaction as found by the Commission, or if such value has not been found by the Commission, as appraised for the purposes of the proposed transaction; and, separately, the net cost of additions and betterments made after the date of valuation or appraisal.

Estimated value of segment of LS&I main line involved	$39,335
LS&I interchange tracks	16,600
Milwaukee Road interchange tracks	

7. The policy and practice followed by each party to the transaction with respect to reserves for depreciation and similar reserves, including rates by classes of property.

As to the LS&I, the Interstate Commerce Commission in letter dated November 9, 1950 authorized amortization

accounting for all undepreciated road property as of December 31, 1949 over a twenty-five year period beginning with January 1, 1950 and ending with December 31, 1974.

This estimated service life was further extended ten years ending December 31, 1984, by the Interstate Commerce Commission in its letter dated December 16, 1955.

[fol. 126] The Milwaukee Road observes depreciation accounting with respect to equipment in accordance with the requirements prescribed by the Commission and at annual rates prescribed by the Commission in its sub-orders prescribing depreciation rates under the order in Docket No. 15100, Depreciation Charges of Steam Railroad Companies, as follows:

Other locomotives	4.54%
Freight train cars	2.54
Passenger train cars	3.21
Floating equipment	2.97
Work equipment	3.6.
Miscellaneous equipment	11.03

The applicant accrues reserves for depreciation of road property in accordance with the provisions of the classification of accounts prescribed by the Commission. The depreciation rates per annum on road property by primary accounts are, as follows:

Engineering	0.80%
Other right-of-way expenditures	0.87
Grading	0.10
Tunnels and subways	0.45
Bridges, trestles and culverts	1.90
Elevated structures	5.00
Fences, snowsheds and signs	2.00
Station and office buildings	2.40
Roadway buildings	2.60
Water stations	2.90
Fuel stations	2.95
Shops and enginehouses	2.00
Storage warehouses	2.00

Wharves and docks	3.25
Communication systems	3.37
Signals and interlockers	2.90
Power plants	1.20
Power transmission systems	2.70
Miscellaneous structures	2.10
Roadway machines	5.75
Public improvements—	
Construction	1.82
Shop machinery	1.95
Power plant machinery	2.60

[fol. 127] 8. The market value of any securities acquired or proposed to be acquired in consummating the proposed transaction; or, if there be no ascertainable market value, the estimated value, giving the basis of the estimate.

No securities proposed to be acquired.

9. If any of the property covered by the application is encumbered and applicant has agreed to assume obligation or liability in respect thereof:

No assumption of obligation or liability is involved.

10. If a consolidation or merger is proposed:

Not applicable; no consolidation or merger proposed.

(d) *Facts and circumstances relied upon to show that the proposed transaction is within the scope of section 5(2)(a) of the Interstate Commerce Act, will be consistent with the public interest, and will otherwise be within the requirements of section 5, particularly:*

1. In case of any proposed transaction:

(i) To establish that the transaction covered by the application will be consistent with the public interest.

Applicants are in doubt as to whether the proposed transaction requires authorization and approval under Section 5 (2), since under the ruling of precedent cases the Commission has held that the interchange of carload traffic

between railroads constitutes merely switching operations which are exempted from Section 5 (2) under the provisions of the last sentence of Section 1 (18) of the Act.

Under the proposed transaction the Milwaukee Road will operate over a segment of the main line of the LS&I for the purpose of interchanging cars with the LS&I. Both the Milwaukee and the LS&I will necessarily operate over the connection and the interchange tracks belonging to the other in order to facilitate such interchange of traffic.

[fol. 128] The connection involved herein is required in order to render reasonably adequate and efficient service to the shipping public by means of direct interchange facilities between the applicants, thereby affording direct two-line joint service by the applicants between points on the LS&I on the one hand and on the other points on the Milwaukee Road.

(ii) To explain and properly support the financial considerations involved in the proposed transaction, including an explanation of economies, if any, to be effected in operation, and increase, if any, in traffic, revenues, earnings available for fixed charges, and net earnings, expected to result from the consummation of the proposed transaction.

The transaction herein contemplated merely would make provision of facilities whereby carload traffic may be interchanged between the applicants without substantially increased financial burden to either. The purpose is not to develop additional new traffic but to provide existing traffic moving between points on the respective lines of the applicant railroads direct through routes and two-line service, thus affording the public with improved and more adequate joint-line service.

(iii) To show the effect of the proposed transaction upon adequate transportation service to the public.

The proposed operation will provide the only physical connection between the applicant lines of railroad and will

thus make possible direct two-line service between all points on the LS&I and the Milwaukee which hitherto have been served only by three-line haul involving greater circuity of mileage and longer time in transit together with the additional transfer between lines necessarily involved. The saving in time and in mileage transported for various shipments will depend upon the location of the points of origin and destination on the respective lines of the applicants. Especial benefits will accrue to industries on the Milwaukee using forest products originating on the LS&I and processing the same in transit under manufacture and re-shipment rates.

[fol. 129]

(iv) To establish that the increase, if any, of total fixed charges resulting from the proposed transaction would not be contrary to the public interest.

There will be no increase in fixed charges. All of the facilities involved are now in place and were financed out of available cash.

(v) To show the interest of the carrier employees affected.

The interest of the employees of the Milwaukee and LS&I will not be adversely affected by the proposed transaction.

(vi) To establish that any guaranty or assumption of payment of dividends or fixed charges contemplated in the transaction is not inconsistent with the public interest.

The proposed transaction does not contemplate any guaranty or assumption of payment of dividends or fixed charges.

2. Also, if the proposed transaction involves a railroad:

(i) To show the effect upon the public interest of the inclusion, or the failure to include, other railroads in the territory involved in the proposed transaction.

Not applicable.

(ii) To indicate what terms and conditions should be imposed by the Commission to meet the requirements of Section 5(2)(f) of the Interstate Commerce Act.

Since there will be no adverse effect upon the employees of either the Milwaukee or the LS&I, no provisions under Section 5(2)(f) is required.

3. Also, in case of a transaction involving a carrier by water subject to Part III of the Act, where any applicant is a carrier as defined in section 1(3) of Part I of the Act, or is a person controlling, controlled by, or under common control with such a carrier, to establish that the transaction is not within the inhibition of section 5 (14) of Part I of the Act; or, if so, that the transaction will not prevent the common carrier by water or vessel involved from being operated in the interest of the public and with advantage to the convenience and commerce of the public and that it will not exclude, prevent, or reduce competition on the route by water under consideration.

Not applicable; no carrier by water is involved.

[fol. 130] **EXHIBITS**

Pursuant to the requirements of the applicable rule the following Exhibits are attached and made a part of this application, or reference made justifying their omission.

Exhibit A

Certified copy of the Articles of Incorporation and of the By-Laws of LS&I was filed in Finance Docket No. 19561.

A copy of the Milwaukee Road's Articles of Incorporation was filed in Finance Docket No. 10882. Copy of Certificate of Amendment, filed with the Secretary of State of the State of Wisconsin, dated May 8, 1951, received and filed May 8, 1951, was filed in Finance Docket No. 17361. Copy of Certificate of Amendment, filed with the Secretary of State of the State of Wisconsin, dated July 13, 1955, received and filed July 14, 1955, was filed in Finance Docket No. 18958. Copy of the Applicant's By-Laws with amendments to May 8, 1951 was filed in Finance Docket No. 17478.

Exhibit B

Certified Copies of the 1956 and 1957 Annual Reports to Stockholders of the Milwaukee Road are filed with the original application and identified as Exhibits B1(a) and B1(b) respectively.

Certified Copies of the 1956 and 1957 Annual Reports to the Stockholders of the LS&I are filed with the original application and identified as Exhibits B2(a) and B2(b) respectively.

Exhibit 1-A (attached)

Resolution of the Board of Directors of the Milwaukee Road authorizing the proposed transaction and the execution and filing of this application.

[fol. 131] Exhibit 1-B (attached)

Resolution of the Board of Directors of LS&I authorizing the proposed transaction and the execution and filing of this application.

Exhibit 2

Included in Exhibits 1-A and 1-B.

Exhibit 3 (omitted)

Not applicable.

Exhibit 4 (omitted)

Not applicable.

Exhibit 5-A (attached)

Opinion of General Counsel of the Milwaukee Road.

Exhibit 5-B (attached)

Opinion of Counsel of the LS&I.

Exhibit 6 (omitted)

Map of trackage involved is included as Exhibit A attached to Exhibit D to the Return to the Questionnaire in Finance Docket No. 20139 (the companion case).

Exhibit 7 (omitted)

Copy of Contract is attached to the Return to the Questionnaire as Exhibit D in Finance Docket No. 20139.

Exhibit 8 (omitted)

General Balance Sheet of Milwaukee Road as of March 31, 1958 is attached as Exhibit F, p. 1, to the Return to the Questionnaire in Finance Docket No. 20139.

General Balance Sheet of LS&I as of March 31, 1958 is attached as Exhibit F, p. 4, to the Return to the Questionnaire in Finance Docket No. 20139.

[fol. 132] Exhibit 9 (omitted)

Statement of Income Account of the Milwaukee Road for the years 1953 through 1957 and the first 3 months of 1958 are attached to the Return to the Questionnaire as Exhibit F, pp. 2 and 3, in Finance Docket No. 20139.

Corresponding Statement for the LS&I is in same Exhibit F, pp. 5 and 6.

Exhibits 10-13, inclusive (omitted)

Not applicable.

Wherefore, Applicants pray the Commission to issue an order approving and authorizing the joint use by said applicants of the facilities of each other as hereinbefore described.

Dated July 15, 1958.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, By: R. S. Stephenson, Vice President.

Lake Superior & Ishpeming Railroad Company, By J. H. Kline, President.

Duly sworn to by R. S. Stephenson and J. H. Kline, jurats omitted in printing.

[fol. 135]

EXHIBIT 1-A TO SUPPLEMENTAL APPLICATION

Resolution by the Directors of Applicant authorizing the proposed transaction and designating by name and for that purpose the executive officer by whom this Application is signed and verified, and filed on Applicant's behalf.

I, J. J. ROCHE, Secretary of CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation of the State of Wisconsin, do hereby certify that the following is a true and correct copy of a certain resolution adopted at a joint meeting of the Board of Directors and Finance Committee of said Chicago, Milwaukee, St. Paul and Pacific Railroad Company, duly held at its office in the City of Chicago, Illinois, on February 20, 1958, at which a quorum was present and voted; and I further certify that said resolution is in full force and effect as of the date of this certificate:

WHEREAS, the line of railroad of the Company at Republic, Marquette County, Michigan, substantially parallels and is in close proximity to a line of railroad

of the Lake Superior & Ishpeming Railroad Company (hereinafter called the Lake Superior Company), and it has been deemed in the interest of the conduct of the business of the Company, as a common carrier of freight by rail, to join with the Lake Superior Company in the construction of a connecting track between the respective lines of railroad of the Company and the Lake Superior Company, and to construct suitable interchange tracks at or near Republic, Michigan, for the purpose of the more convenient interchange of freight traffic between the Company and the Lake Superior Company; and

[fol. 136] WHEREAS, it is the desire of this Board that, if the construction of said connecting track and interchange facilities and the operation thereof be subject to the jurisdiction of the Interstate Commerce Commission, the Company be authorized to make and file with the Interstate Commerce Commission, or to join with the Lake Superior Company in the making and filing of an application with the Interstate Commerce Commission, for a certificate of public convenience and necessity authorizing the construction of said connecting and interchange tracks and the operation thereof;

IT IS, THEREFORE,

RESOLVED, that the Company be, and it is hereby, authorized to make and to file, or to join with the Lake Superior Company in the making and filing of, an application, if such application be required by law, with the Interstate Commerce Commission, for a certificate of public convenience and necessity authorizing the construction of said connecting track, said interchange tracks, and the operation thereof, and that William J. Quinn, President, or R. S. Stephenson, Vice President and Comptroller, be, and they hereby are, severally designated as the executive officers to sign, verify and file such application.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COM-

PANY, at my office in the City of Chicago, County of Cook and State of Illinois, this 9th day of July, A.D. 1958.

J. J. Roche
Secretary

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

(SEAL)

[fol. 137]

EXHIBIT 1-B TO SUPPLEMENTAL APPLICATION

Resolution adopted by the Directors of Applicant Lake Superior & Ishpeming Railroad Company authorizing the proposed transaction and designating by name and for that purpose the executive officer by whom this Application is signed and verified, and filed on applicant's behalf.

I, A. E. YELLAND, Secretary of the Lake Superior & Ishpeming Railroad Company, a corporation of the State of Michigan, do hereby certify that the following is a true and correct copy of a certain resolution adopted by the Board of Directors of said Lake Superior & Ishpeming Railroad Company, at a special meeting of the Board held on the 21st day of July, 1958; and I further certify that said resolution is in full force and effect as of the date of this certificate:

"WHEREAS, in connection with the application to the Interstate Commerce Commission authorized by resolution of the Board of Directors of Lake Superior & Ishpeming Railroad Company at a special meeting held on March 6, 1958 and filed with the Interstate Commerce Commission under Finance Docket No. 20139, it appears to be prudent and advisable to file a supplemental application authorizing the joint use of trackage of and by the Lake Superior & Ishpeming Railroad Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company under Section 5(2) of the Interstate Commerce Act; and

WHEREAS, it is in the interest of the Lake Superior & Ishpeming Railroad Company to effectuate the proposed contract with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company dated November 1, 1957, and identified as Exhibit D filed with the Interstate Commerce Commission with the Return to the Questionnaire in Finance Docket No. 20139,

NOW THEREFORE, BE IT RESOLVED that J. H. Kline, President and General Manager, and A. E. Yelland, Secretary, be authorized, subject to any necessary approval and authorization by the Interstate Commerce Commission, to execute said contract on behalf of Lake Superior & Ishpeming Railroad Company; and

BE IT FURTHER RESOLVED that Lake Superior & Ishpeming Railroad Company join with Chicago, Milwaukee, St. Paul and Pacific Railroad Company in a suitable application to the Interstate Commerce Commission under Section 5(2) for the approval and authority of that Commission to the effectuation and consummation of said contract, and that J. H. Kline as president and general manager, and W. A. Zerbel as assistant to the president and either of them be and are hereby authorized, empowered and directed for and on behalf of the Lake Superior & Ishpeming Rail-
[fol. 138] road Company to make, execute, verify, authenticate and file such application, and to do any and all other things necessary and proper in order to prosecute the same."

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Lake Superior & Ishpeming Railroad Company at my office in the City of Marquette, County of Marquette and State of Michigan this 21st day of July, 1958.

/s/ A. E. YELLAND
Secretary

(CORPORATE SEAL)

Lake Superior & Ishpeming Railroad Company

[fol. 139]

EXHIBIT 5-A TO SUPPLEMENTAL APPLICATION

OPINION OF COUNSEL

I am Vice President and General Counsel of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the Applicant in the foregoing proceeding, and am familiar with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company's charter and its corporate powers thereunder.

It is my opinion that the proposal of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for which it is seeking authority in said Application, namely, operation over and joint use of certain trackage of the Lake Superior & Ishpeming Railroad Company, is within the charter powers of Chicago, Milwaukee, St. Paul and Pacific Railroad Company and meets the requirements of the law and will be legally authorized and valid if approved by the Commission.

E. R. ECKERSALL
Vice President and General Counsel

CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY

Chicago, Illinois
July 9, 1958

[fol. 140]

EXHIBIT 5-B TO SUPPLEMENTAL APPLICATION

July 7, 1958

Lake Superior & Ishpeming Railroad Company
Marquette, Michigan

Gentlemen:

As counsel for the Lake Superior & Ishpeming Railroad Company and immediately in charge of the matters involved in the application docketed as Finance Docket No. 20139 and the instant application related thereto, I am familiar with the terms and conditions of the proposed contract identified as Exhibit D of the Return to the Ques-

tionnaire in Finance Docket No. 20139 and with the charter of Lake Superior & Ishpeming Railroad Company.

In my opinion the officers of Lake Superior & Ishpeming Railroad Company are authorized to execute said contract on its behalf and the said company possessed ample power to carry out the agreement referred to and the transaction described and covered by the instant application meets the requirements of the law.

Yours very truly,

/s/ B. H. DAVIDSON

B. H. Davidson
Attorney

BHD:mc

[fol. 1]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20048

In the Matter of:

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD CO.,
LAKE SUPERIOR & ISHPEMING,
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC.

Finance Docket No. 20139

In the Matter of:

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC,
LAKE SUPERIOR & ISHPEMING RAILROAD.

Transcript of Hearing—Friday, September 5, 1958

Hearing Room, Federal Building, Ishpeming, Michigan.

Met, pursuant to notice, at 9:30 a.m.

Before: John L. Bradford, Examiner, Interstate Commerce Commission.

APPEARANCES:

R. K. Merrill, 888 Union Station, Chicago 6, Illinois, appearing fo Chicago, Milwaukee, St. Paul and Pacific Railroad Com any, applicant.

J. J. Nagle, 8 8 Union Station, Chicago 6, Illinois, appearing for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, applicant.

L. S. Hamilton, 888 Union Station, Chicago 6, Illinois, [fol. 2] appearing for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, applicant.

Philip H. Porter, 708 First National Bank Building, Madison, Wisconsin, appearing for Lake Superior & Ishpeming Railroad Company, applicant.

B. H. Davidson, Peninsula Bank Building, Ishpeming, Michigan, appearing for Lake Superior & Ishpeming Railroad Company, applicant.

Thomas M. Beckley, 1734 First National Bank Building, Minneapolis, Minnesota, appearing for Duluth, South Shore and Atlantic Railroad Company, intervenor.

C. H. Dickman, 400 West Madison, Chicago, Illinois, appearing for Chicago & North Western Railway Co., intervenor.

[fol. 4] Proceedings

Exam. Bradford: Gentlemen, let's come to order, please. Gentlemen, this is the time and place set by the Interstate Commerce Commission for hearings in Finance Docket No. 20048, which is a complaint filed by the Duluth, South Shore and Atlantic Railroad Company against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior and Ishpeming Railroad. The other hearing is in Finance Docket No. 20139, which are applications of the Milwaukee and Lake Superior & Ishpeming for authority to operate over a line of railroad connecting their lines.

We will take the appearances first of the applicants and then followed by the appearances of the complainants and

then any other appearances that are available.

Who appears for the Chicago, Milwaukee, St. Paul & Pacific?

Mr. Merrill: R. K. Merrill, J. J. Nagle, and L. S. Hamilton, 888 Union Station, Chicago 7, Illinois. We are admitted to practice before the Commission.

Exam. Bradford: Who is appearing for the Lake Superior & Ishpeming?

Mr. Davidson: B. H. Davidson, Peninsula Bank Building, Ishpeming, Michigan, appearing for Lake Superior & Ishpeming Railroad Company, and Philip H. Porter, First National Bank Building, Madison, Wisconsin, appearing for Lake Superior & Ishpeming Railroad Company, applicant.

[fol. 5] Both of us are attorneys at law and admitted to practice before the Commission.

Exam. Bradford: Who appears for the complainant, Duluth, South Shore and Atlantic?

Mr. Beckley: Thomas M. Beckley, 1734 First National Bank Building, Minneapolis, Minnesota, appearing for Duluth, South Shore and Atlantic Railroad Company. I am admitted to practice before the Interstate Commerce Commission.

Exam. Bradford: You are also an intervenor in the application?

Mr. Beckley: In Docket No. 20139.

Exam. Bradford: Are there any other appearances?

Mr. Dickman: Yes. Charles H. Dickman, 400 West Madison, Chicago, Illinois, appearing for Chicago & North Western Railway Co., intervenor in the application of the Milwaukee and L. S. & I. in Docket No. 20139.

Exam. Bradford: You have filed your petition to intervene and it has been granted?

Mr. Dickman: Yes, sir.

Exam. Bradford: In your petition you state "As your interest might appear". Are you able to make it more definite at this time?

Mr. Dickman: Yes, I believe we are opposing.

Exam. Bradford: You are opposing the application.

Are there any other appearances?

[fol. 6] (No response.)

Exam. Bradford: Off the record.

(Discussion off the record.)

Exam. Bradford: We will go on the record and you may repeat it.

Mr. Porter: Mr. Examiner, the original application of the Milwaukee, and L. S. & I. Railroad was accompanied by a motion to dismiss the same on jurisdictional grounds. The applicants urge the same grounds in support of a dismissal of the supplemental application and the applicants' desire to have their motion considered in connection with both the original and the supplemental applications. We didn't repeat the motion to dismiss for the reason we felt it would be merely duplicative of the first motion and the second application being docketed as supplemental that it would technically cover the supplement as well as the underlying application.

Exam. Bradford: You understand, of course, that I am unable to rule on your motion at this time?

Mr. Porter: Yes, I understand that that will be presented with the case.

Exam. Bradford: That is fine.

You may proceed, then.

Mr. Merrill: Call Mr. Crippen, please.

E. E. Crippen was sworn and testified as follows:

[fol. 7] Direct examination.

By Mr. Merrill:

Q. Would you state your name, address, and occupation, please?

A. C. E. Crippen, C-r-i-p-p-e-n, 863 Union Station, Chicago, Illinois, assistant to the president, Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Q. What is the nature of your duties, Mr. Crippen, in that capacity?

A. General supervisory matters as assigned by the president covering operations on the entire system of the Milwaukee Railroad.

Q. Do you have any exhibits for introduction in this proceeding?

A. I do have.

Mr. Merrill: May we have them marked for identification, Mr. Examiner? If we can go off the record for this.

Exam. Bradford: Off the record, yes.

(Discussion off the record.)

Exam. Bradford: On the record.

(Applicant's Exhibits Nos. 1 thru 4, Witness Crippen, were marked for identification.)

Exam. Bradford: Are you ready?

Mr. Merrill: Yes, sir.

Exam. Bradford: You may proceed.

By Mr. Merrill:

Q. Mr. Crippen, the exhibits you have prepared in this [fol. 8] proceeding have been marked off the record as Exhibits Nos. 1, 2, 3, and 4. Will you please refer to Exhibits Nos. 1, 2, and 3, and explain what they purport to show?

A. Exhibit marked for identification No. 1 is a black lined print entitled "C. M. St. P. and P. Railroad Company, railroad lines—Upper Michigan". Approximate scale, one inch equals eight miles, dated May 26, 1958, and shows by a legend illustrated in the lower left-hand corner of the exhibit the line of railroad in the Upper Peninsula of Michigan in the area involved in these proceedings, for example, the lines of the Milwaukee Railroad are shown by a solid black line, the lines of the Chicago and North Western Railway are shown by a cross hatched line. The other lines of railroad are shown by the legend as indicated in the exhibit.

Exhibit No. 2 for identification is a black-lined print entitled "C. M. St. P. and P.-L. S. & I. interchange connection, Republic Junction, Michigan", approximate scale,

one inch equals four miles, dated August 12, 1958. The lines of railroad involved are shown by characteristic line and have been labeled. The solid black lines are the lines of the Milwaukee Railroad, the heavy dashed lines, the lines of the Lake Superior & Ishpeming, and the other lines of railroad are labeled showing the general area in the vicinity of Republic Junction, Michigan.

Exhibit marked No. 3 for identification is a black line [fol. 9] print entitled "C. M. St. P. and P. Railroad Company plat, showing interchange tracks with L. S. & I. at Republic Junction, Michigan. Scale one inch equals 100 feet, dated August 12, 1958. The exhibits shows in some detail the location of the switch or interchange tracks at Republic Junction, and with respect to the interchange tracks, those tracks owned by the Milwaukee Railroad have been colored red and those tracks owned by the L. S. & I. Railroad have been colored blue. The divisions of ownership and the length of track ownership are shown in a notation in the upper part of the exhibit.

Q. If I may interrupt, Mr. Crippen, in Exhibit No. 2 you spoke of Republic Junction which is not shown on the map as such. Would you please indicate where Republic Junction would be on Exhibit No. 2?

A. The exhibit carries a notation C. M. St. P. and P.-L. S. & I. connection, and it is at that point as indicated on the notation that the designation "Republic Junction" is located and is the location of the connection between the Milwaukee Road and the L. S. & I.

Q. Are you familiar personally with the point of connection and the connection which has been made at Republic Junction, Mr. Crippen?

A. I am.

Q. Will you describe, then, the connection itself, please?

A. The connection is approximately two miles north of [fol. 10] Republic, Michigan, along the lines of the Milwaukee Railroad at a point where the traffic of the Lake Superior & Ishpeming Railroad paralleled the track of the Milwaukee Railroad and where the track centers between the tracks with approximately 21 or 22 feet. A connection as shown between the points "A", "B", and "C", on Ex-

hibit 3 was made between the Milwaukee track and the L. S. & I. track and then switching tracks as shown between the letters "D", "F", "H", and "E" were constructed parallel to the L. S. & I. main track.

Q. According—excuse me, Mr. Crippen—according to Exhibit No. 3, the property of the Milwaukee Road and the L. S. & I. seem to join with no intervening property in-between, is that correct?

A. That is correct between the limits of the right-hand edge of the exhibit and about the center of the exhibit. The property line of the Milwaukee Railroad is shown by a conventional line consisting of a long dash, two short dashes and a long dash. The property of the L. S. & I. is shown by a light dashed line followed by a short dash and then a long dash line followed by a short dash. And the lines are common from about the center of the exhibit to the extreme right end of the exhibit and then diverge from the center of the exhibit to the left end of the exhibit.

Q. At the point where the connection is made the two properties immediately adjoin, is that correct, sir?

[fol. 11] A. That's correct.

Q. Will you proceed with your explanation of the connection?

A. The connection was constructed in 1957 and was placed in operation on October 21, 1957. The type construction is standard for side track and switching tracks of this character, and the tracks are used for the purposes of switching cars between the Milwaukee Railroad and the L. S. & I. Railroad at this point.

Q. Will you please refer to Exhibit No. 4 and explain that exhibit, please?

A. Exhibit No. 4 consists of a reproduction of 11 typewritten pages plus a map marked Exhibit A and is the proposed agreement dated November 1st, 1957, between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company covering the construction, operation, and maintenance of the interchange tracks at Republic Junction. This agreement has not been fully executed. It has been in the process of negotiation and we think that in the form as shown in Exhibit 4 it will constitute the final agreement covering the use of the trackage involved here.

Q. This agreement differs somewhat from the proposed agreement which was attached to the application in this proceeding, does it not?

A. Yes, it does.

Q. Are you familiar with the actual operations by the [fol. 12] Milwaukee Railroad at this point of connection with the Lake Superior & Ishpeming Railroad?

A. I am.

Q. Will you describe them, please?

A. Our normal train service consists of Train No. 69, a northbound train scheduled to operate daily except Saturdays and Mondays, and a southbound train, No. 82, scheduled to operate daily except Saturdays and Mondays. These trains have a direct connection from Chicago and Milwaukee and to Chicago and Milwaukee for connections in all directions from those points and operate on a schedule from Chicago and Milwaukee with a connection from Channing. No. 69 is scheduled to leave Channing at 9:30 p. m., Republic at 10:45 p. m., and Champion at 11:12 p. m. No. 82 is scheduled to depart Champion at 12:01 a. m., scheduled at Republic at 12:40 a. m., and scheduled to arrive at Channing at 2:15 a. m. These trains serve the territory in the vicinity of Republic and Republic Junction. Train No. 69 switches cars from its train to the interchange tracks at Republic for the L. S. & I. and Train No. 82 switches from the interchange tracks at Republic Junction cars from the L. S. & I. switching them into their train at that point and carrying them on beyond.

Q. Would you describe in more detail the actual interchange of the cars at that point, the actual switching operations?

A. Train No. 69, the northbound train, approaches from [fol. 13] the south or the right-hand edge of Exhibit No. 3. On arrival at Republic Junction the train switches from its train those cars which are to be switched to the L. S. & I. at Republic Junction. Having assembled those cars the engine pulls the cars through the connection "A", "B", and "C" and places or switches the cars to the track which has been designated on Exhibit No. 3 as Track No. 1, Milwaukee delivery. Having switched the cars to this track, the engine then returns to its train and proceeds to

Champion. On the return trip, No. 82, moving from Champion in a southerly direction to Channing and Milwaukee stops at Republic Junction, cuts off its engine and goes through the connection "A", "B", and "C" and switches from the track designated as Track No. 2, L. S. & I. delivery, those cars destined to the Milwaukee Railroad, switches the cars through the connection and into its train at Republic Junction and then proceeds to Channing and its ultimate destinations, Milwaukee, Chicago, and other connections.

Q. What is the frequency of the operation to and from this connection at Republic Junction and what has it been in the past?

A. The regularly scheduled operation is five days per week on the line extending from Channing to Champion. Prior to the establishment of the switch tracks at Republic Junction, the normal operation averaged about four days per week. There was not sufficient business to justify the [fol. 14] full five-day-per-week operation. Since the establishment of the switch tracks at Republic Junction the frequency of train operation has increased and will average about five-days-per-week operation. This involved both the operation at Republic Junction and at Champion. In other words, there has been an increase in frequency of operation between the entire line between Channing and Champion since the construction and operation of the switch tracks at Republic Junction.

Q. What was the cost of the construction of this connection?

A. The Milwaukee Road's portion of the cost of construction was $14,345.14.

Q. Would that be approximately half of the total cost of construction?

A. It would be, yes.

Q. By reason of this construction has the Milwaukee Railroad been able to serve any new territory with its own operations?

A. No, sir, we have not.

Q. Has the L. S. & I. been able to serve any new territory by reason of its connection with the Milwaukee?

A. No, sir, they have not.

Q. Will you state whether or not the Milwaukee is called upon by the shippers over the D. S. S. and A. or over the L. S. & I. to furnish equipment for their loading?

A. Yes, sir, they are.

Q. Have you made any investigation as to whether the [fol. 15] Milwaukee has been able to fill those requests for cars promptly?

A. Yes, sir, I investigated such requests or orders for equipment as have been placed to the D. S. S. and A. and the L. S. & I. to the Milwaukee Railroad and found that all such requests for equipment since the establishment of the interchange track at Republic Junction have been filled promptly.

Q. Do you know whether or not the interchange of traffic between railroads entails any substantial work and expense?

A. Yes, sir, I do.

Q. In connection with an additional interchange of traffic between two railroads, would you describe briefly what that means in the way of additional work and expense?

A. In connection with the physical handling of the cars it means the switching and separating of the cars to be delivered in interchange and then the physical act of switching them from a train to a delivery track and in the reverse, the removing of tracks from an interchange—the removal of cars from an interchange track and switching the cars into a train. In addition to that there are the clerical and paper records involved in such interchange of cars including the report of the interchange of cars, the station records involved in making the interchange, and the ultimate accounting records involved in the division of rates and similar matters.

Q. Generally speaking, does an additional interchange of cars between railroads have any effect on the time in [fol. 16] transit of those cars from origin to destination?

A. Generally speaking, it does, because it involves an additional handling in connection with the movement of the cars and the paper records involved and does result in some delay to the movement of such cars.

Q. Did you mention the work connected with the classification of the cars which would be an incident to an inter-

change between two lines? Is there any such work required?

A. Yes, it involves the switching out of such cars from other cars, a separation of the cars so they may be delivered in a group to the delivery track.

Mr. Merrill: Mr. Examiner, we will have later testimony from shipper witnesses concerning the time involved incident to three-line hauls as compared to two-line hauls and so forth. I don't propose and I don't believe this witness made any particular investigation as to the details of additional time involved.

By Mr. Merrill:

Q. Mr. Crippen, do you know whether or not any cars are picked up at Republic Junction or delivered there by the Milwaukee Road's passenger train that operates in that territory?

A. There are none.

Mr. Merrill: I see.

That's all.

Mr. Porter: May I ask one question on direct?

[fol. 17] Exam. Bradford: You should follow the Milwaukee on that.

Mr. Porter: I have one point I didn't catch.

By Mr. Porter:

Q. In connection with this delay that occurs more times or when you interchange a car from one line to another, is there an element of delay involved in the cars waiting on the interchange for the schedule of the train to which they're—by which they're to be picked up?

A. Usually that is the case. Each railroad involved in an interchange of cars adjusts its operations to meet its normal and usual situation, and the scheduling of freight cars in interchange frequently and usually involves some delay from the time the cars are placed on an interchange track and until they are picked up from that track and handled further by the receiving line.

Q. One further question, Mr. Crippen. These cars that are picked up from the L. S. & I. by the Milwaukee, do they have to be classified at some point on your line?

A. Yes, sir, they are taken to a terminal point and are classified in accordance with the ultimate destination of the car and are then placed in a train for further movement.

Q. Is that classification work done at Channing or some other point or would it be done at Iron Mountain or done at some other point on your railroad?

A. The cars received from the L. S. & I. at Republic Junction would get their first yard classification at Chan-
[fol. 18] ning. For example, cars moving to Milwaukee and points beyond would be placed in a group of cars for that destination at Channing. Cars for delivery to Green Bay or connections at Green Bay would be placed in a group of such cars at Channing. That initial classification would take place at Channing.

Q. And the cars that are to be transferred by the Milwaukee to the L. S. & I., are they classified in a single string on the train that runs up through Republic sometime prior to getting there?

A. Yes. That grouping or classification for delivery to the L. S. & I. at Republic Junction is accomplished at Channing so that when the train leaves Channing all of the cars in the train for delivery to the L. S. & I. for delivery at Republic Junction are in a group and at arrival at Republic Junction the engine simply takes that group of cars, moves through the connection and switches to the delivery track.

Q. In order to do that it is necessary to make that classification somewhere on the line?

A. That is correct.

Mr. Porter: That is all I have.

Exam. Bradford: That classification, if I understand it, is merely classified for delivery, they are not classified for the L. S. & I., are they?

The Witness: No, sir, they are simply classified for the purpose of delivery to the L. S. & I. and not with respect

[fol. 19] to ultimate destination or commodities on the L. S. & I.

Exam. Bradford: Gentlemen, I think at this time we had better state that the return to questionnaire filed in Finance Docket 20139 would be considered as a part of the record and subject, of course, to cross-examination. And I presume, Mr. Crippen, you are responsible to the answers in that return?

The Witness: In some measure, yes, sir.

Exam. Bradford: And you will be available to support them on cross-examination?

The Witness: Yes, sir.

Mr. Merrill: Mr. Examiner, I inadvertently omitted about two questions. Could I ask them at this time?

Exam. Bradford: Certainly.

By Mr. Merrill:

Q. Mr. Crippen, does the train operating between Channing and Champion which also serves Republic Junction make deliveries or pick up cars from industries along the track, along the main line?

A. Yes, sir, it serves all of the stations between Channing and Champion, including the delivery of cars in interchange to the D. S. S. and A. at Champion and the receiving of cars in interchange from the D. S. S. and A. at Champion.

Q. Now, insofar as it makes deliveries to industries along that main track and confining your answers strictly to the physical handling of the cars switched at Republic Junction, comparing the two operations, is there any more [fol. 20] work incident to the switching of cars at Republic Junction than there is in a switch to an ordinary industry along that line?

A. Well, the function is basically the same. That is, the engine takes cars from its train, switches the cars to adjacent track and placed properly, and leaves them there and returns to its train. It is basically the same function as switching and industry track.

Mr. Merrill: That is all.

Mr. Porter: Mr. Examiner, I take it that your remark about the return to the questionnaire goes as well to the supplemental application which contains similar material to what has been—

Exam. Bradford: Well, of course, the applications are always a part of the record, Mr. Porter.

Mr. Porter: Thank you.

Exam. Bradford: And the return usually, however, has been accepted as a part of the record subject to cross-examination.

Mr. Beckley, you may cross-examine.

Cross examination.

By Mr. Beckley:

Q. Mr. Crippen, prior to the construction of this connection track between the L. S. & I. and the Milwaukee, were there any facilities for the interchange of freight between the two railroads?

A. There were none.

Q. Calling your attention to Exhibit A attached to the [fol. 21] proposed agreement which was attached to the returned questionnaire filed in Finance Docket 20139, I note that a portion of the L. S. & I. main line track is colored in yellow and that there is no corresponding marking on Exhibit No. 3. Can you explain the reason for this change in the marking in the two exhibits?

A. Yes, sir. The exhibit which accompanied return to questionnaire was one of the early drafts of the proposed agreement between the L. S. & I. and the Milwaukee Railroad. In the early considerations of the matter it was thought desirable to include a portion of the L. S. & I. main track in the agreement simply for the purposes of convenience in connection with switching cars to and from the interchange tracks. As the negotiations proceeded further and the thinking on the subject clarified it was concluded that it would not be necessary to include that portion of the main line of the L. S. & I. which was colored yellow in the exhibit accompanying the draft of proposed agreement which accompanied the return to questionnaire. The

Exhibit A, which accompanies Exhibit No. 4 of this proceeding, correctly illustrates the situation as now contemplated by the L. S. & I. and the Milwaukee Railroad.

Q. Could you clarify that for me? Do I understand Exhibit No. 3 represents the situation outlined?

A. Both Exhibit No. 3 and Exhibit A attached to Exhibit 4—

Q. Oh, I see.

A. (Continuing) —of this proceeding correctly portray [fol. 22] the situations.

Q. Now, in the actual operation of delivering cars to the L. S. & I. you made reference to the fact that this delivery was made on the northbound movement and that the cars were left on Track No. 1 as indicated in Exhibit 3, is that correct?

A. That's correct.

Q. Now, would the engine be at the head of that cut of cars?

A. It would be at the head or the north end of the cut of cars and would pull into the track which has been designated Track No. 1 on Exhibit No. 3.

Q. Now, when the engine cut off from the cut of cars, what movement would the engine have to make to get back to the Milwaukee line?

A. There are two alternatives. One is the engine might move back through Track No. 2, if that track were clear, or it might move along the L. S. & I. main track to Point C where it would return to the Milwaukee track.

Q. Well, in order to get to Point C it would be necessary for it to pass through Point H and Point E on the L. S. & I. main line and then back down to Point C, is that right?

A. Yes. If the engine pulled in on Track No. 1 with its cut of cars and returned by the L. S. & I. main track, the engine would pass by Point H and E and move by the L. S. & I. main track to Point C.

Q. So in actual operations you do intend to use that por- [fol. 23] tion of the L. S. & I. main track which is colored in yellow in Exhibit A attached to the draft of agreement which was attached in turn to return to questionnaire?

A. We may, for convenience in connection with the switching of cars to Track No. 1, use that portion of the L. S. & I. main track but solely for convenience in connection with the switching of cars to Track No. 1. It is not absolutely necessary that that be done, but under some circumstances we will find it convenient to do that, and if that is the case it will simply be for the sole purpose of returning the engine to our own track and consistent with universal practice in connection with the switching of cars in interchange to railroads over our entire system.

Q. In the event you go out on the L. S. & I. main track, it will be necessary to protect your train movement?

A. The main track in this territory is in what has been designated yard limits and under the operating rules the main track may be used without protecting against second and inferior class trains. There are no trains superior to second class trains operated on this line and all of the movements are within yard limit rules and involves no flagging operations except where weather conditions or dew conditions would make such situations desirable for safety.

Q. In the new agreement marked as Exhibit 4, I note in the second "whereas" clause that the Ishpeming Company [fol. 24] is agreeable to granting the Milwaukee Company the license and permission to use so much of its main line and so forth in that paragraph.

A. Yes.

Q. Is there anywhere in this agreement a designation of the extent of the main line of the L. S. & I. which would be used in that manner?

A. Only to the extent as shown in the "whereas" clause.

Q. There is not grant of license other than in the "whereas" clause?

A. That is my recollection. I was just checking to make sure; under Section 3, "Use of faciiities", the grant of the Ishpeming Company in the second paragraph includes the use of the turn out shown in blue on Exhibit A between Points B and C which is the crossover track. And I think that completely covers the matter of license and use.

Q. That is, there is no specific license granting you the right to use the line of the L. S. & I. between Points D and E and sufficient distant north of E for your engine to clear the switch?

A. That is correct, except as covered by the "whereas" clause.

Exam. Bradford: Do I understand that you are proposing to amend your application in this respect?

Mr. Merrill: Mr. Examiner, insofar as the first application requested approval of a joint operation over approximately 4,000 feet of track we are not requesting such au-
[fol. 25] thority in this proceeding. We have found that amount of track to be entirely unnecessary in that connection. Now, I believe we will make a statement, if we may, during the course of this proceeding as to whether we wish to amend it further than to eliminate that amount of the main track from the scope of this application. It would be a restrictive amendment in any event. But we will make our position clear on that before the record is closed here.

Exam. Bradford: You may proceed.

By Mr. Beckley:

Q. Prior to the construction of this connecting track, your company had facilities at Champion for the interchange of traffic with the D. S. S. and A. is that right?

A. That is true, and it still exists, of course.

Q. And you continue to maintain those facilities?

A. Yes.

Q. Now, did you receive via that connection traffic which was destined for or which had originated at stations on the line of the D. S. S. and A. which are also stations on the line of the L. S. & I.?

A. Yes, sir.

Q. Was the service provided by the D. S. S. and A. to those common points satisfactory as far as the Milwaukee was concerned?

A. I am not familiar in detail with the service of the D. S. S. and A. We delivered the cars to the D. S. S. and
[fol. 26] A. at Champion and they handled them from that point and we received the cars from the D. S. S. and

A. at Champion and handled them from that point. As to the adequacy of the service of the D. S. S. and A. on its line I am not in position to testify. I will say that I have no knowledge of complaints.

Q. Do you consider the L. S. & I. service in any way superior to the D. S. S. and A. service to those common points?

A. Well, as I say, I am not familiar with the D. S. S. and A. service, neither am I familiar in detail with the L. S. & I. service and therefore cannot testify as to the adequacy of either. I will say for the L. S. & I. as I did for the D. S. S. and A. I am not familiar with any complaints concerning their service.

Q. You have mentioned that this track was placed in operation on October 21, 1957. Could you give us some estimate as to the amount of planning time that went into the construction of this connecting track before its final completion?

A. Well, the original considerations and negotiations in the matter together with the planning location, engineering aspects of it, covered a period of probably four or five months.

Q. So that approximately four or five months was the first date in which you actually started seriously working out the plans for the construction of this connection?

A. We gave consideration to the creation of such a connection and the reasons for the need for such a connection [fol. 27] and ultimately concluded to build the connection and then went ahead with the construction.

Q. And that was all within a period of four or five months before the date of completion?

A. That's right.

Mr. Beckley: That is all I have.

Mr. Dickman: I have a few questions.

Exam. Bradford: All right, Mr. Dickman.

Cross examination.

By Mr. Dickman:

Q. Just to clarify my own mind more than anything else, on your operation south from Republic Junction when you pick up the cars, as I understand your testimony, you pick up the cars from the L. S. & I. at Republic Junction and you carry them south on your Train 82, is that correct?

A. That's right.

Q. And you carry them down to Channing?

A. That's right.

Q. Did I understand you to say they were classified, the cars in this train then went through some type of preliminary classification before the train moved south?

A. That's correct.

Q. Train 82 doesn't run south of Channing?

A. Yes, it does, but we have other operations that funnel into Channing. There is an operation from Ontonagon and that comes to Channing as well as the operation from [fol. 28] Champion. The operations from Champion has cars from the D. S. S. and A. and the L. S. & I. and these cars are all followed into Channing and then are switched initially so they are in groups or blocks for a through movement to ultimate terminal and further handling. For example, cars destined to Milwaukee and points beyond would be grouped together so they would require no further handling except the through movement from Channing to Milwaukee.

Q. I see. And how far is it from Republic Junction to Channing?

A. 23.8 miles.

Q. And how far is it from Channing to Iron Mountain?

A. 24.1 miles.

Q. Approximately 48 miles from the Republic Junction to Iron Mountain, is that right?

A. Approximately, yes.

Q. As I recall your testimony, you say that this connection at Republic would give the Milwaukee no additional new territory, am I misquoting you?

A. My testimony was that we would serve with our own lines no additional territory by reason of the construction of these tracks. In other words, we serve no additional land areas, no additional industries. We serve no additional territory with our own lines by reason of the construction of this trackage.

Q. You don't mean by that, do you, that you will get no additional traffic?

[fol. 29] A. I simply mean that we will not serve with our own facilities additional territory.

Q. Directly?

A. Correct.

Q. But you will get additional traffic?

A. Yes, sir, it is our earnest hope and desire that we do get additional traffic, that was constructed for the purpose of meeting a need in serving traffic requirement. We hope to benefit by it.

Q. As I understand from the return to questionnaire, you don't intend that this new traffic you intend to get is not new industry or anything in the area but is obtained from other sources already existing in the area, is that correct?

A. Well, no, sir, as a matter of fact, the primary consideration was the development of new traffic from new territory.

Q. What I am saying, new to you or not moving prior to the connection.

A. This was new traffic that had not prior to the construction of this traffic been available. In other words, it was development of new sources of traffic.

Q. Well, let me ask you this question and maybe I am going beyond the scope of the direct, but what type of traffic has been moving over this interchange at Republic that you got from the L. S. & I.?

A. Another witness will give detailed information with [fol. 30] respect to that.

Mr. Dickman: All right, I will withdraw that.

Exam. Bradford: I think Mr. Dickman means that whether or not this traffic you are getting at Republic Junction is new rail traffic or is it just new traffic for the Milwaukee.

The Witness: It is primarily new rail traffic. It comes from a new territory that did not previously generate traffic. That is the primary source of the traffic. It is not the whole and exclusive source but is the primary and by far the predominant source of traffic.

Mr. Dickman: That is what I would like to find out, what he has in mind.

Exam. Bradford: I understand he has another witness that can answer your questions.

Mr. Dickman: All right, I will withhold that.

I don't believe I have anything further.

Redirect examination.

By Mr. Merrill:

Q. Mr. Crippen, what railroads do reach the new territory in which that new traffic is being generated?

A. The Lake Superior & Ishpeming Railroad.

Q. It is not reached by the Milwaukee Railroad, is it?

A. No, sir, it is not.

Mr. Merrill: I think the later witnesses will clarify the nature of that traffic, Mr. Examiner.

Exam. Bradford: On your Exhibit No. 1, Mr. Crippen, [fol. 31] does that show the entire railroad of the L. S. & I.?

The Witness: Yes, sir, to the best of my knowledge and belief it does show the entire—

Mr. Porter (interrupting): What about the line north of Marquette?

The Witness: Except a line extending northerly from Marquette to Big Bay. With that exception I believe the exhibit shows the entire lines of the L. S. & I.

Exam. Bradford: That is all I have.

The Witness: For further clarification I might say that Big Bay is located on a line that extends northwesterly from Marquette, a distance of 27 miles.

Exam. Bradford: Do you have another question?

Mr. Dickman: Can I ask a short question in regard to the other line of questioning regarding this new traffic?

Recross examination.

By Mr. Dickman:

Q. You are not saying, Mr. Crippen, that none of the traffic that is now moving over this interchange was formerly traffic that was handled L. S. & I., C. & N. W., you are not saying that, are you?

A. No, sir, I am not saying that. What I am saying is this. The primary and predominating bulk of traffic moving over this connection is new traffic originating on the L. S. & I., but I further say that that is not the total traffic nor all of the traffic, it is simply the large bulk.

[fol. 32] Q. But there will be diversion from the North Western to the Milwaukee, then?

A. That I don't know.

OFFERS IN EVIDENCE

Mr. Merrill: We would like to offer in evidence Exhibits No. 1 through four, inclusive.

Exam. Bradford: Any objection?

Mr. Dickman: We have no objection.

Mr. Beckley: No objection.

Exam. Bradford: They are received in evidence.

(Applicant's Exhibits Nos. 1 thru 4, Witness Crippen, were received in evidence.)

Mr. Merrill: I am through with this witness.

Exam. Bradford: Witness excused.

(Witness excused.)

Mr. Merrill: Mr. Hettinger, please.

W. K. HETTINGER was sworn and testified as follows:

Direct examination.

By Mr. Merrill:

Q. Would you state your name, address, and occupation, please?

A. W. K. Hettinger. My position with the Milwaukee Railroad is that of statistician on the staff of the vice-president and comptroller. My business address is Room 749 Union Station, Chicago.

Q. Will you describe your duties with the Milwaukee Railroad?

[fol. 33] A. My duties are primarily assigned as various problems arise to make cost analysis of various phases of operation and to prepare for management various studies in connection with deficiency or profit or loss as far as various operations are concerned.

Q. Were you particularly assigned to make any study in connection with the traffic which is moving through the Republic Junction interchange between the Milwaukee Road and L. S. & I. for any particular period?

A. Yes, sir, I was.

Q. Have you prepared an exhibit to show that information?

A. Yes, sir.

Mr. Merrill: We ask that this one-page exhibit of Mr. Hettinger be marked for identification as Exhibit No. 5.

Exam. Bradford: It may be so identified.

(Applicant's Exhibit No. 5, Witness Hettinger, was marked for identification.)

By Mr. Merrill:

Q. Will you make whatever explanation you deem necessary with respect to Exhibit No. 5, Mr. Hettinger?

A. Yes, sir.

Exhibit No. 5 shows the volume of traffic that has used the interchange at Republic Junction from the time it went into operation October 21, 1957, through June 30th of 1958, and shows in Section A the carload traffic that originated on the L. S. & I. and terminated on the Milwaukee [fol. 34] Railroad; in Section B traffic which originated on the L. S. & I. and was delivered to the Milwaukee Railroad at Republic Junction for movement beyond the Milwaukee Railroad to another foreign railroad. In Section C is shown traffic which originated on the Milwaukee Rail-

road and was handled by Republic Junction and terminated on the L. S. & I. Under Section D traffic which originated on foreign lines and was handled to Republic Junction by the Milwaukee Railroad and was delivered to the L. S. & I. for termination on their line.

Q. Does this exhibit show that the predominance of the traffic was handled from the Milwaukee to the L. S. & I. or from the L. S. & I. to the Milwaukee?

A. Predominantly from the L. S. & I. to the Milwaukee Railroad.

Q. And of that traffic is it predominantly a two-line haul or more than a two-line haul?

A. A two-line haul.

Q. And that is shown in what section of this exhibit?

A. Section A.

Q. Is this exhibit true and correct to the best of your knowledge and belief?

A. Yes, sir.

Q. Have you any further comment with respect to this exhibit?

A. No, sir.

Mr. Merrill: The witness is tendered for cross examination.

Exam. Bradford: Mr. Porter, do you have any questions?

[fol. 35] Mr. Porter: No, thank you.

Cross examination.

By Mr. Beckley:

Q. Mr. Hettinger, do you have any knowledge of the points of origin or destination of the L. S. & I. of the various commodities shown in this exhibit?

A. Yes, sir.

Q. For example, Line 2, charcoal, what is the point of origin on the L. S. & I. of the commodity?

A. Marquette, Michigan.

Q. And that is a point which is also on the line of the D. S. S. and A.?

A. The town of Marquette is, yes, sir.

Q. What?
A. Yes, sir.
Q. Where did the sawdust originate?
A. At Marquette.
Q. And where did the lumber originate?
Q. Some at Munsing and some at Marquette.
Q. Where did the ore originate?
A. At Ishpeming.
Q. Is Ishpeming also a station on the lines of the D. S. S. and A.?
A. Yes, sir.
Q. What proportion of the logs and chemicals that originated at Sunrise Landing?
[fol. 36] A. I would say practically all of it. I have one car from Cushing.

Mr. Merrill: How do you spell that, Mr. Hettinger.
The Witness: C-u-s-h-i-n-g.

A. (Continuing) Approximately 50 cars from a point called Williams Crossing. The rest is from Ewalt's Landing, the old name of the new station or from Sunrise Landing, which is the new name.
Q. In Line 20, chemical wood, what is the principal destination of that?
A. Marquette, Michigan.

Mr. Merrill: Destination he said.
The Witness: Marquette, on Line 20, chemical wood, Marquette.

By Mr. Beckley:

Q. Line 21, cement?
A. The cement moved to various places among which were Ishpeming, Republic Mine, Michigan, I think that's it.
Q. Your oil and gasoline shown in Line 23 moved where?
A. To Ishpeming and also to Republic Mine.
Q. Your roofing, Line 24?
Q. Negaunee and to Marquette and to Republic Mine.

Exam. Bradford: Is Republic Mine at the south end of the L. S. & I. track? Is that where it is located?

The Witness: It is my understanding that it is outside of the Town of Republic and located on the Lake Superior [fol. 37] & Ishpeming Railroad.

By Mr. Beckley:

Q. On Line 29, what was the destination for the steel?

A. Negaunee, Ishpeming; that would be it, Negaunee and Ishpeming.

Q. And of the tractors in Line 30?

A. To Marquette.

Q. Are you familiar with the answer to Question 24 of the returned questionnaire and that is on Page 7 of the returned questionnaire?

A. Yes, sir, I am familiar with that question.

Q. Was the answer to that question based on a projection of the data developed in this Exhibit No. 5?

A. No, sir. The data that was furnished in answer to Question No. 24 took into consideration traffic that had moved over the interchange track up to that point. The Exhibit No. 5 brings the information up to the 30th day of June. This questionnaire was filed sometime in May.

Exam. Bradford: May 26.

By Mr. Beckley:

Q. And the answer in Item 24 of the questionnaire was based on a projection of the traffic figures that were available as of May 26, is that right?

A. Partly based on the traffic that was moved and partly based upon the experience that the L. S. I. people have had up in this territory. In other words, there was cooperation [fol. 38] between the two railroads in the answering of that question.

Q. Well, for example, how did you arrive at this estimate of approximately 260 carloads of miscellaneous traffic which were to terminate—I think perhaps the answer in the questionnaire should be clarified. What movements are comprehended within this 260 carloads of miscellaneous traffic?

A. Charcoal, paper, sawdust, and other miscellaneous traffic.

Q. That is traffic which was to originate on the L. S. & I. and be delivered to the Milwaukee, is that right?

A. That is right, yes, sir.

Q. Was that estimate based on existing movements of materials out of the territory served by the L. S. & I.?

A. Yes, sir.

Q. So that that traffic would have been diverted from other railroads to the Milwaukee?

A. I wouldn't say that because I have no knowledge of whether that may have been new traffic or whether it was diverted or where it may have come from. All that I knew at the time was that the traffic moved by the interchange at Republic Junction.

Q. Well, you are not fully familiar then with the matter which this 260 carloads or the 96 carloads in the next line were estimated?

A. They were based upon traffic which had moved by Republic Junction up to the time the estimate was made and those figures were extended for a year's figure. That is all.

[fol. 39] Q. I see, so that there might be an increase in that traffic as a result of further solicitation?

A. There could be, yes.

Mr. Beckley: That is all.

Cross examination.

By Mr. Dickman:

Q. Mr. Hettinger, referring to your Exhibit No. 5, in Item 2, charcoal, what was the destination?

A. The majority of those cars terminated at Galewood, Illinois, and a considerable number of those go to South Beloit, Illinois, Rockford, Illinois, and Milwaukee, Wisconsin.

Q. How about the destinations on No. 3, sawdust?

A. Most of those cars go to Wauwatosa, Wisconsin.

Q. And 4, Lumber, destination?

A. Various destinations, I have Galewood, Illinois, Watertown, Wisconsin, Moline, Illinois.

Q. How about No. 5, your iron ore, the destination, please.

A. Middleton, Wisconsin, primarily, Milwaukee, Wisconsin.

Q. And the paper in Line 7, the destination?

A. Stoughton, Wisconsin.

Q. Beg pardon?

A. Stoughton, Wisconsin.

Q. Now, Items 8 and 9, what was the principal destination of those?

A. Iron Mountain, Michigan, and Amasa, Michigan.

Q. Was most of it to Iron Mountain or was there a per-
[fol. 40] centage? Could you give us a rough estimate?

A. Most of it terminates at Iron Mountain, just what percentage I don't know. I would have to go through and figure it out.

Q. The greatest proportion is Iron Mountain, is it?

A. Yes, sir.

Q. And that is a common point with the North Western?

A. Yes, sir, the North Western serves the Town of Iron Mountain.

Q. Now, as I recall your answer to Mr. Beckley's question about the origin of the log and chemical wood, you said the majority was the Sunrise, is that correct?

A. Yes, sir.

Q. How long has that been moving out of Sunrise?

Mr. Merrill: Via Republic Junction, Mr. Dickman.

Mr. Dickman: Just moving out of Sunrise.

By Mr. Dickman:

Q. Is it a new location?

A. Yes, sir.

Q. And about how long has logs and chemical wood been moving out of Sunrise?

A. Since the latter part of last year, to my knowledge.

Q. Might it be October 21 of 1957, the same date the connection was put in?

A. It may have been sometime after that date. That is the first traffic that I know of, yes, sir.

Q. Is Beloit a common point with the North Western?

[fol. 41] A. Beloit, Wisconsin?

Q. Beloit, Wisconsin.
A. It is.

Exam. Bradford: Common with the Milwaukee?
Mr. Dickman: Common with the Milwaukee and North Western. I am referring to the destination items he mentioned in 1 through 9.
Mr. Porter: Wasn't it in South Beloit, Illinois?
Mr. Merrill: That is what he said.
Mr. Dickman: That is what he said, South Beloit.
The Witness: That is right.

By Mr. Dickman:

Q. Is South Beloit a local point on the Milwaukee?
A. To my knowledge it is.
Q. Is Milwaukee a local or common point to the North Western in Milwaukee?
A. Yes, sir.
Q. It is a common point?
A. Milwaukee, Wisconsin?
Q. Yes.
A. Yes, sir.

Mr. Dickman: We all know that.

By Mr. Dickman:

Q. Do you know how the traffic which you indicated in "A" of your Exhibit 5, how it moved prior to this connection, if it moved, or don't you know?
[fol. 42] A. The majority of that traffic, 1500 carloads of that traffic did not move prior to the construction of the interchange track.
Q. How about the balance?
A. How the other moved prior, I have no information.
Q. All these items under "A", those were two-line hauls, I mean there were two lines involved in the haul in all of those movements?
A. Yes, sir; yes, sir.

Mr. Dickman: I don't think I have anything further.
Exam. Bradford: Any redirect?

Mr. Merrill: No, sir.

Exam. Bradford: The witness is excused.

(Witness excused.)

OFFER IN EVIDENCE

Mr. Merrill: We would like to offer into evidence Exhibit No. 5.

Exam. Bradford: Any objections?

Mr. Dickman: No objection.

Exam. Bradford: It is received in evidence.

(Applicant's Exhibit No. 5, Witness Hettinger, was received in evidence.)

Exam. Bradford: We will take a short recess.

(Short recess.)

Exam. Bradford: Come to order, gentlemen.

JAMES H. KLINE was sworn and testified as follows:

[fol. 43] Direct examination.

By Mr. Porter:

Q. Will you please state your name and address?

A. J. H. Kline, K-l-i-n-e, Marquette, Michigan.

Q. What is your occupation?

A. I am president and general manager of the Lake Superior & Ishpeming Railroad Company.

Q. Would you briefly indicate what has been your railroad experience?

A. From 1921 until 1948, except for time at school, I served the Chicago North Western Railway Company in 1921 as a laborer, clerk, chief clerk, train master, assistant superintendent, superintendent; 1948 I left the North Western and started work for the Lake Superior & Ishpeming Railway Company as superintendent. In 1950 I was made vice-president of the railroad and in 1952 I was made its president and general manager.

Q. Please describe briefly the Lake Superior & Ishpeming Railroad.

A. The Lake Superior & Ishpeming Railroad comprises some 170 miles of main track located entirely within the Upper Peninsula of Michigan. The principal terminal of the railroad is at Marquette where the headquarters are located. The lines west of Marquette are used largely for the transportation of iron ore from Negaunee, Ishpeming, Republic, and other loading points on the Marquette iron range to the L. S. & I. shiploading docks at Marquette. Iron ore constitutes about 75 per cent of the traffic handled on that part of the railroad.

[fol. 44] The lines east of Marquette extend to Munsing and to Sunrise Landing which is located some 86 miles east of Marquette at the eastern terminus of our east branch extension. In addition to general freight, the lines east of Marquette are used principally for the carriage of forest products, lumber, saw logs, pulpwood, and chemical wood.

Q. Mr. Kline, you signed and verified the original application in this proceeding, the return to the questionnaire and the supplemental application, and I presume you are familiar with the contents of those documents?

A. Yes, sir.

Q. Are there certain corrections in the figures which should be made in the answers to the questionnaire?

A. Yes. On Page 10 the figures should be corrected as follows: Gross revenue shown as 311—

Exam. Bradford (interrupting): Just a moment.

Mr. Porter: Just a moment.

By Mr. Porter:

Q. You said Page 10, did you mean that or is it Page 9?

A. No, Page 10.

Q. I am sorry.

Exam. Bradford: That is in the second line, top of the page.

A. (Continuing) Page 10, the gross revenue shown is 311,700. That should read 305,950. The net railway op-

[fol. 45] erating income was shown as 63,370 and it should

be 62,200. And on Line 8, the net railway—would contribute to net railway operating income, $13,400 was shown, that should be 33,450.

By Mr. Porter:

Q. Do you have any other correction or qualification which you desire to make in connection with the response to the questionnaire?

A. Yes.

Question 30 shown on Page 9 asks for an estimate of the net railway operating income to be derived from the traffic expected from the involved connection. We pointed out that the connection was expected to generate new traffic but in our answer to Question 29 we indicated the character and volume of traffic which we expected would be handled over the connection. We discovered no way of determining specifically just what the profitableness of this traffic was or what the effect of the connection would be on the profitableness of the same, and for that reason we merely applied our total expense ratio to the gross revenues expected to be received from it. We do not believe that the resulting figure would necessarily be the effect on net railway operating income but it seemed to be the best that we could do.

Q. Now, with that explanation and qualification and with the corrections which you have just made, are the matters and things set forth in the documents I have referred to true and correct to the best of your knowledge and belief [fol. 46] and as reported to you by other officers of the company?

A. Yes, sir.

Q. This application seeks authority to operate over certain trackage connecting the L. S. & I. with the Milwaukee near Republic, Michigan, for the purpose of interchanging cars and carload traffic between the Milwaukee and L. S. & I. When was that physical connection established, Mr. Kline?

A. Connecting tracks were laid during the summer of 1957 and the physical connection was completed, I believe, on October 21, 1957.

Q. Was any certificate authorizing such construction sought or secured by either the L. S. & I. or the Milwaukee?

A. No, we were advised by counsel that a certificate was not necessary for the construction or operation.

Q. How, then, did it come about that the application was filed?

A. A petition challenging our right to operate over this connection was filed with the Commission by the Duluth, South Shore and Atlantic Railroad. We were then advised that it would be well to file an application without prejudice to our position that no certificate was required by the Interstate Commerce Act. I was authorized to execute and file the applications and accordingly directed our attorneys to do so.

Q. In your application you state that authorization by the board of directors of your railroad was resolved on March 6, 1958, and do you have a copy of that resolution [fol. 47] here and in form to offer as an exhibit in this case?

A. Yes, I have such an exhibit.

Mr. Porter: May we have this identified, Mr. Examiner?

Exam. Bradford: It will be identified as Exhibit No. 6.

(Applicant's Exhibit No. 6, Witness Kline, was marked for identification.)

By Mr. Porter:

Q. And is Exhibit 6 to the best of your knowledge a true and correct copy?

A. Yes, it is.

Q. Mr. Kline, in response to Question 3 of the return to the questionnaire it is indicated that the Cleveland-Cliffs Iron Company of Cleveland holds some 75 per cent of the common stock of the L. S. & I. Is the management of the L. S. & I. conducted independently of that of Cleveland-Cliffs Iron Company?

A. Yes. The Cleveland-Cliffs management has always refrained from any interference with the management of the railroad and with the decisions of the railroad officers and directors to pursue such practices and policies as the latter deem to be in the best interest of the railroad itself. None of our directors are connected with the Cleveland-

Cliffs management and the same is true of the officers who are shown on Page 4 of the supplemental application.

Q. What was the purpose of constructing the connection involved?

A. It was to provide a direct connection with the Milwaukee and two-line service on traffic moving between [fol. 48] points on the Milwaukee and points on the L. S. & I. Principally and primarily it was to provide a suitable and practicable routing over the Milwaukee Railroad for saw logs and chemical wood originating at our east branch and moving to Iron Mountain and Amasa. We had been requested to establish such a routing by the industry at Iron Mountain.

Q. Was there already a route open for such traffic via the North Western with interchange at Little Lake?

A. Yes.

Q. Why, then, was another route to Iron Mountain required?

A. Saw logs move on what are known as manufacture and reshipment rates. In order to get the benefit of these rates the industry at Iron Mountain must ship the products out over the carrier who brings the logs in. In order to use the Milwaukee Railroad on outbound tonnage it must bring in raw material via the Milwaukee and use the Milwaukee and North Western on inbound material in the same proportion in which these railroads are used for outbound traffic. For that reason the railroad requires inbound routing via both of these carriers. Furthermore, it is to be noted that the industry is served directly by the Milwaukee and not the North Western.

Q. Are there other advantages to the public and to your railroad which flow from this direct connection with the Milwaukee Railroad?

A. Yes, if all other things are equal, to have a single-line [fol. 49] route is preferable to a joint-line route, and two-line service is preferable to three-line. Generally speaking the fewer transfers which need to be made from one carrier to another the less delay in transit there will be, the tracing of shipments is facilitated and responsibility for the service is more readily fixed.

One of our problems has been the supply of cars for which we must rely in part on our connecting lines. Until this connection was made we had no connection with the Milwaukee Road, but now we are able to draw on the Milwaukee as well as the North Western, the D. S. S. & A. and the Soo Line for an adequate supply of cars. This has been of real benefit to us and our patrons.

Another important factor was the supply of flat cars for logs and chemical wood. We have a total of 258 of these cars but 88 of them are older and weaker and have caused trouble when handled in the very large trains operated by the C&NW. We were notified in August, 1955, by the C&NW that they could no longer accept these cars in interchange. The Milwaukee Road does not operate long, heavy trains on their line from Republic Junction to Iron Mountain and the 88 cars in question are entirely adequate. This means a very substantial saving to our line as we can avoid per diem on the foreign cars.

Q. Mr. Kline, in addition to what you have just said about the three-line and two-line traffic, do interchanges of [fol. 50] cars from one line to another cost the railroads money?

A. Yes, they require the switching out of the cars to go to another line and the performance of all the necessary handling and duties that is required in an interchange movement.

Q. Is there additional clerical work involved in the settling of interline accounts and so forth?

A. Yes, each time an interchange movement is made it requires a record of the interchange of the cars to the other line and other clerical work that is necessary in the division of traffic, division of revenue, et cetera.

Q. And must those costs be reflected in the long run in the rates that are paid by shippers that are handling the traffic?

A. Yes.

Q. Now, getting back for a moment to the logs moving to Iron Mountain and Amasa, what proportion of the traffic of the total traffic which has moved and which is expected to continue to move over the connection, over the Milwaukee to Republic?

A. Over 90 per cent of the carloads yielding over 85 per cent of the revenue consisting of logs and chemical wood.

Q. Has the involved connection been responsible for diverting any of this category of traffic from the D. S. S. and A.?

A. No, none of this traffic ever moved over the D. S. S. and A. In fact, there are no through rates applicable on it via D. S. S. and A. routing.

Q. In your judgment would the establishment of a rout-
[fol. 51] ing for this traffic, that is, for logs and wood from Sunrise Landing to Amasa and Iron Mountain over the D. S. S. and A. be feasible and practicable?

A. No.

Q. Why not?

A. Because in my judgment the rates on this traffic, particularly to Iron Mountain, are too low to provide for three-line movement with diversions to three railroads.

Q. Should that be with "divisions"?

A. With divisions, I am sorry, division.

Q. What are these rates?

A. From Sunrise Landing to Iron Mountain the rate is 12 cents per 100 pounds on chemical wood with minimum load of 80,000 pounds, and 13 cents on saw logs with minimum load of 90,000 pounds. To Amasa the rate on saw logs is 18 cents.

Q. Mr. Kline, my notes indicate that the minimum on the 12-cent rate is 70,000 pounds. Are you—

A. That is right, I made a mistake, 70,000 pounds is the minimum.

Exam. Bradford: Is Amasa on the Milwaukee?

The Witness: Amasa is on the Milwaukee.

Mr. Porter: I think it is about 35 miles north of Iron Mountain.

Exam. Bradford: Is this it here (indicating)?

Mr. Porter: Yes, sir.

[fol. 52] By Mr. Porter:

Q. Could these rates be increased to provide better compensation so as to allow for an additional interchange and participation of a third carrier in the transportation?

A. I believe not. They are as high as the traffic will bear in the face of motor truck competition. As a matter of fact, in order to hold the traffic to the rails we had to reduce the rate to Iron Mountain on saw logs from 17 cents to 13 cents and on chemical wood from 15 cents to 12 cents. Even these rates are higher than the cost of motor transportation claimed by the industry. I am satisfied that if we raised the rates by even one cent per hundred pounds we would lose most if not all of this traffic to the motor carriers.

Now, on a carload of chemical woods which averages according to our experience about 86,000 pounds per car, 12 cent rate yields revenue of a hundred and three dollars and twenty cents of which the Milwaukee receives $30.96 and leaves the L. S. & I. 72.24 for originating the traffic and hauling a hundred and twenty-three miles. If this traffic was to be handled via the D. S. S. and A. in addition to the other two lines and were to be delivered to that railroad at Marquette, the D. S. S. and A. would be entitled to $34.30 as its division and this would leave the L. S. & I. with 37.94 for originating the cars at Sunrise Landing, hauling it 86 miles to Marquette and making a very expensive interchange involving four miles of switching in order to deliver to the D. S. S. and A.

[fol. 53] Q. In view of that situation do you feel you could enter into the establishment of such a route at that rate?

A. No, I am satisfied that we could not afford such a rate.

Q. And if you did not do so and if the connection at Republic were held not to be legal and should not be authorized by the Commission, what would be the result?

A. The only result would be that the traffic would probably go to the motor carrier.

Q. In response to Question 29 of the questionnaire, Mr. Kline, you stated that you expected to move annually about 2800 cars of logs, chemical wood, and other forest products from Sunrise Landing over the involved connection and that after five years this volume would gradually decline to about 50 per cent. What was the basis for that estimate?

A. Well, on our experience up to that date it was estimated that there would be about 2800 cars to Iron Mountain and Amasa for the next five years or until the first cutting of the selective cycle is completed. After that there will be a reduction in the number of carloads estimated to be 50 per cent.

Q. Is that reduction because of the unavailability of the wood around Sunrise Landing after the completion of the first cycle of selective cutting?

A. It amounts to that because the first cycle is heavier as it leaves only the healthy and growing trees and when the second cycle is started, why, the volume will not be [fol. 54] as great as in the first cutting.

Q. Now, was the reduction in rate from Sunrise Landing to Iron Mountain made after this return to the questionnaire was completed?

A. Yes, it was.

Q. And what would be the effect of that reduction on the gross revenues which you estimated in the questionnaire?

A. We estimated in the questionnaire that the gross revenues would be $397,600. Now, by reason of reducing this rate in order to meet the truck competition our gross estimate would become $315,000.

Q. Is that an approximate figure being an estimate?

A. Yes, that is approximate.

Q. Was the estimate of the other traffic, charcoal, paper, sawdust, et cetera, also made on the basis of your experience through April, 1958?

A. Yes, it was based on our experience up to that time after the connection was opened up in October 21, 1957, to April 30, a period of six months we have handled to the Milwaukee Road 61 carloads of charcoal, eight carloads of paper, 18 carloads of sawdust, and 24 carloads of other freight. The revenue from this traffic has totalled approximately $7,000.

Q. How was the construction involved here financed by the L. S. & I.?

A. It was paid out of operating cash.

[fol. 55] Q. Will you state what your train service is to and from Republic Junction?

A. We operate daily train service to and from Republic. This is all handled by switch engines from Ishpeming and we pass Republic Junction en route to Republic about 10 o'clock in the morning and return from Republic passing the interchange going back to Ishpeming probably about noon of each day.

Q. Was that service in effect prior to the establishment of the interchange, Mr. Kline?

A. No. For a long time prior to the interchange we only operated infrequently on the lines to take care of the needs of the mine at Republic, but a short time prior or within 1957 we were required to commence daily operation on a five-day basis to the Republic mine to serve that mine.

Q. So that the increase in frequency was not due to the connection but to the requirements of Republic mine, is that correct?

A. That is right.

Q. Is Republic mine the only station on your line south of Republic Junction?

A. Yes, the only one.

Q. So that the traffic handled by the switch engine as it passes Republic Junction would be entirely traffic going to or from Republic mine together with the traffic which would be interchanged with the Milwaukee there at the Junction, is that correct?

[fol. 56] A. That is correct.

Q. Will you describe very briefly what the physical operation is for the handling of your cars at this interchange?

A. Cars for the Milwaukee Junction or for the Milwaukee Railroad are classified into blocks at Ishpeming yard by yard crews and then placed in a train in one block and when the train arrives at the Republic Junction they deliver a solid block of cars onto our delivery track from our main line.

Q. Now, you spoke, I believe, if you were to transfer this traffic to the D. S. S. and A. of a relatively expensive interchange at Marquette. Would you describe what is necessary there in order to get the traffic to and from the D. S. S. and A. at that point.

A. Our yard at Marquette into which our route crews operate is located four miles, approximately four miles, from our transfer to the D. S. S. and A. Cars for the D. S. S. and A. arriving at our yard in road trains are switched out of the train and placed in a block for movement to the D. S. S. and A. transfer. After the cars have been switched out the air hose must be coupled and after the locomotive is on the train and pumps up the air to the required pressure, an air test must be made and the train then departs to operate the four miles to the D. S. S. and A. transfer, which is entirely through the City of Marquette, with very frequent street crossings in many places only a block apart, and necessitating slow movement for safety [fol. 57] to the D. S. S. and A. transfer and the cars delivered onto the transfer.

Q. Now, in connection with this logs and chemical wood, pulpwood traffic, I think you stated you use flat cars, your fleet of flat cars. Do you also get cars from your connecting lines for that traffic?

A. Very minimum number of cars have been required from other lines because of the expeditious handling of the material. We have in most cases been able to deliver cars from Sunrise Landing to the Milwaukee transfer at Republic Junction the second day—well, I will correct that, the first day—the next day, make it. The next day from pulling these loads at the loading tracks at Sunrise Landing. The Milwaukee with their daily service moving the cars promptly to Iron Mountain has resulted in a quick turn around of the cars and with very few exceptions with our 258 available cars we have been able to take care of all that load.

Q. You anticipate that the same thing would be true if you had to make this interchange with the D. S. S. and A. they interchanged with the Milwaukee Road at Champion?

A. I am not too familiar with the service on the D. S. S. and A. but I doubt if it would move that fast and in fact I am almost sure it would not.

Q. Do you have any empty loads—do you have any loaded return movement of these cars towards Sunrise Landing? [fol. 58] A. No, none whatever.

Q. So it is a hundred per cent empty return of cars, is that right?

A. That is right.

Mr. Porter: That completes my direct.

Perhaps Mr. Merrill may have some questions that I haven't.

Mr. Merrill: I have nothing, Mr. Examiner.

Exam. Bradford: All right, we will have the cross-examination. Mr. Beckley.

Before we go into the cross-examination, is it my understanding that the rate on these logs and chemical wood is a transit rate?

The Witness: No. Well, let me qualify that. I am not a traffic man but maybe I can answer your question. There is no transit rate on chemical wood. However, as I understand it, the railroad which handles saw logs into a destination is entitled to the outbound tonnage on what they call a manufacture and reshipment rate.

Exam. Bradford: Well, that in effect is.

The Witness: In effect, it is.

Exam. Bradford: As a matter of fact, a transit of the logs?

The Witness: Yes.

Exam. Bradford: You may proceed.

Cross examination.

By Mr. Beckley:

Q. Mr. Kline, you have spoken of new traffic which has [fol. 59] recently been generated on the L. S. & I. Do I understand that that is the traffic which was derived from that track which was constructed east from Cusino to Sunrise Landing as indicated on Exhibit 1 under authority of the Commission in Finance Docket 19804?

A. I will agree that you are stating the right finance docket, that is substantially true, yes.

Q. Now, in the course of those proceedings in the Finance Docket 19804 did the L. S. & I. make certain representations as to what the destinations were to be for the products originating from the new extension?

A. I believe they did, yes.

Q. Did they show a large volume of traffic moving to Iron Mountain?

A. Yes.

Q. What routing was suggested for that traffic in that finance docket?

A. Via the C&NW at Little Lake.

Q. Do you consider the service via the C&NW to Iron Mountain competitive with the routing provided via the Milwaukee through this new connection at Republic?

A. Well, I would presume it is competitive, yes.

Q. Did you indicate in that request for authority in the application and questionnaire attached thereto that there would be any movement of saw logs to Amasa from the proposed extension?

[fol. 60] A. I don't recall that there was any such reference made.

Q. In your answer to Question 30 of the Questionnaire on Page 10 you indicated that the operating ratio for the L. S. & I. in 1957 was 59.93 per cent and the total expense ratio 79.67 per cent. What has been the experience of the L. S. & I. since the construction of this connection at Republic with respect to operating ratios?

A. Well, the answer to Question 30 indicated the operating ratio for 1957, for the year 1957. Since that time, of course, a full year has not gone by and we don't know what our operating ratio is going to be for 1958. I can say, however, that our operating ratio is much higher than that at the present time because we are just entering into the months when the greater proportion of our earnings are forthcoming.

Q. Well, for comparable months in 1958 as compared to the same months in '57, what has been the general pattern since the connection has been constructed?

A. Are you speaking of operating ratio?

Q. Yes.

A. For the period up to—I don't remember the exact figure—but for the period up to and ending June 30 we were operating in deficit.

Q. So that if you use the figures for the first six months of '58 you would come out with a very different railway [fol. 61] operating income in response to, in your answer to, Question 30 in the questionnaire, very much reduced, I take it?

A. That is true for that particular period, yes, sir.

Q. On what date was the track to Sunrise Landing completed?

A. I am sorry, I don't have it, but it was about October 15, 1957.

Q. At approximately the same time the connection was established at Republic and placed in operation?

A. That is correct.

Q. Were you familiar with the circumstances surrounding the original construction of the extension from Duncan on the C&NW to Republic Mine in 1948 and 1949?

A. Yes.

Q. You did not establish a connection with the Milwaukee at that point at that time?

A. No, sir.

Q. Are you aware whether representations were made to the various other railroads in this territory as to your intentions with reference to establishing such connection?

A. We stated in our application to the Commission at that time that such a connection was not contemplated.

Mr. Merrill: Mr. Examiner, I think there may have been a mistake. Would you read back the first question about the extension from Duncan to Republic Mine? I believe it is from Chicago to connections.

[fol. 62] Mr. Beckley: I think it shows on the original construction there.

Mr. Merrill: But the extension you referred to was the L. S. & I.

Mr. Beckley: That is right.

Mr. Merrill: I don't think we need to read it back, then.

By Mr. Beckley:

Q. You spoke of the need for supply of cars from the Milwaukee as one of the considerations which supports the creation of this connection?

A. That's right.

Q. But, then, on the other hand you represented that with respect to the major portion of this traffic you had no need of that source of supply. That is with respect to the forest products moving from the east branch extension on flat cars?

A. Not on flat cars up to the present time we have had very little need for other equipment, that is correct.

Q. So that the benefits you would derive from having a supply from the Milwaukee are restricted to the 260 cars of miscellaneous freight you anticipate would move via the connection?

A. That is true.

Q. Rather than the remaining 2800 cars.

Now, were you familiar with the briefs that were filed on behalf of the L. S. & I. in connection with the application in Finance Docket 19804, east branch extension?

A. I would have to be refreshed about what you are talk- [fol. 63] ing about, I don't know.

Q. Did you read the briefs that were submitted to the Commission on your behalf at that time?

A. Yes.

Mr. Porter: Thank you.

By Mr. Beckley:

Q. And you took no exception to the statement made on your behalf that the traffic off the extension was all outbound and in no material degree subject to competition of connecting lines for its routing?

A. Yes.

Q. And as far as you are concerned, you believe that correctly represents the position of the L. S. & I.?

A. For purposes of clarification, we are talking about the competitive handling of this traffic, is that right?

Q. That is right. The question is whether the traffic off this east branch was subject in any material way to competitive routing.

A. Well, there wouldn't be any as far as the L. S. & I. is concerned. What the shippers would say would be something else.

Q. Well, you have described the route to Iron Mountain in conjunction with the North Western as competitive with the route in conjunction with the Milwaukee.

A. That's right.

Q. And I take it that is what we mean by "competitive routing"?

[fol. 64] A. That is right.

Q. And as far as you are concerned that was a proper representation of the position of the L. S. & I. that the traffic from the extension was in no material degree subject to competitive routing?

A. As far as we are concerned, yes, sir.

Mr. Porter: At that time.

The Witness: At that time, yes.

By Mr. Beckley:

Q. To your knowledge has the L. S. & I. been actively soliciting routing in conjunction with the Milwaukee from points on the L. S. & I. which are competitive with points on the D. S. S. and A.?

A. No, we don't solicit traffic, Mr. Beckley. That is shipper's routing. We have these various connections with all these lines but we don't solicit one as against another.

Q. Your traffic department makes no suggestions to shippers as to the way they should ship?

A. Well, no, everything is based in connection with service. We don't solicit as one railroad favoring another unless there is a question of rates or a question of service.

Q. Nevertheless, the existence of this connection at Republic enables you to solicit traffic to points that are common to the D. S. S. and A. and the L. S. & I. which you were not in a favorable position to solicit previously?

A. That is partly true but there are a lot of factors in- [fol. 65] volved in that because one of them is the location of the industry. If an industry is located on the D. S. S. and A. we are in no position to solicit traffic to that industry because we know that and another railroad added to the rate, which would probably be too low a division to be worthwhile.

Q. Of course, you don't have that problem at points where you have reciprocal switching?

A. Well, yes, you do.

Q. You have simply the switching charge to be absorbed.

A. That is true.

Q. It is not an additional factor in the division arrangement?

A. What I am trying to say, you cut in another line and absorb the switch charge. It can't be done because there isn't enough revenue involved.

Mr. Beckley: Well, that is all I have.

Mr. Dickman: Mr. Examiner, do you want me to proceed now or should we go to lunch?

Exam. Bradford: I think we can wind this witness up before lunch.

Cross examination.

By Mr. Dickman:

Q. Mr. Kline, in handling cars from Sunrise Landing to this connection at Republic I am not sure I am clear exactly how you handle them. Maybe you mentioned this and I didn't catch it. Do you take them down to Lawson and then to Marquette?

[fol. 66] A. They move from Lawson to Marquette to Republic Junction.

Q. And then to Ishpeming, did you say?

A. Yes.

Q. Where they are classified?

A. The road crews operate to Ishpeming and then from there it is done by switch engine.

Q. It is broken up at Ishpeming?

A. Yes.

Q. And a switch crew takes it to Republic Junction?

A. Right.

Q. How far from Sunrise to Republic Junction?

A. A hundred and twenty-three miles.

Q. And how far is it from Sunrise Landing to Little Lake?

A. Would you mind if I get help from my traffic man?

A Voice: 68.9.

A. 68.9.

By Mr. Dickman:

Q. And I believe you said you could get cars from Sunrise Landing to Republic Junction the next day, is that what you testified?

A. No—yes. I am sorry, yes. We pulled today during our regular season and we pulled today, for example, out of Sunrise Landing, those cars would be delivered to the Milwaukee tomorrow noon or thereabout.

Q. And how long would it take you today, those same cars, to Little Lake?

[fol. 67] A. They would be delivered the same day that they were pulled from the Sunrise Landing.

Q. How would these logs, chemical wood, move from Sunrise Landing in your opinion if this connection were not in existence at Republic, I mean how would they move to Iron Mountain?

A. There is only one way to move and that would be by C&NW.

Q. Is that also a two-line move?

A. That is a two-line rate.

Q. Is the rate the same as the rate via Republic?

A. Yes, it is.

Q. Is it the same, there are M and R rates on the Iron Mountain via Little Lake on the North Western.

A. I understand there is on the saw logs, yes.

Q. How many empties have you received from the Milwaukee, Mr. Kline, in connection with this new traffic so-called?

A. I wouldn't know from my own knowledge, but I could say it would be very few by reason of the light amount of traffic that had moved that way and also—let me explain this. That a period like this you are probably aware of the fact that there is pretty light loading on a lot of railroads today. In times like these equipment is not much of a problem anywhere, any kind. So consequently during the

past few months during this recession it hasn't been any problem to get equipment at all and we have been able [fol. 68] to furnish a lot of our own equipment.

Q. Hasn't the North Western furnished you equipment in the past?

A. Oh, yes, yes; they furnish us equipment as requested.

Q. Mr. Kline, do you get a greater division from the Milwaukee than the North Western on shipment of logs to Sunrise to Iron Mountain?

A. Yes.

Q. You do. That doesn't influence you at all, then, in soliciting business over the Milwaukee?

A. We do not solicit that business, no. That is entirely determined by the shipper as to what his routing would be. We handle cars to the transfer at Republic Junction, maybe the next day we will get all the bills. Sunrise Landing would be via the CNW. We don't have anything to do with that.

Q. You don't care one way or another?

A. No, we don't.

Q. You would be perfectly satisfied if they all moved on the C & N W?

A. That is up to the shipper, he has told us he wants them both ways because of the transportation situation, that is all we know.

Q. I see.

Exam. Bradford: Is the shipper the producer of the logs at Sunrise Landing or is it the industries at Iron [fol. 69] Mountain and Amasa?

The Witness: No, the shipper is the producer.

Redirect examination.

By Mr. Porter:

Q. You spoke of the shipper as dictating a routing in the movement of traffic. Is that done by the shipper or the receiver?

A. It may be a combination of both. I really don't know. I know we are instructed as to how to route them. Usually the shipper, as far as I know.

Q. I think it leaves a little question because of the problem of balancing tonnage would be on the part of the industry.

A. Undoubtedly the consignee tells the shipper how he wants to route it, but we wouldn't know about that.

Exam. Bradford: Who pays the freight bills, do you know that?

The Witness: Pardon?

Exam. Bradford: Who pays the freight bills, the shipper or the consignee?

The Witness: The consignee.

Recross examination.

By Mr. Dickman:

Q. Who is the shipper, Mr. Kline?

A. In the majority of the cases at Sunrise Landing it is the Cleveland-Cliffs Iron Company.

Q. And they are the ones that designate?

A. Each time our crew goes into Sunrise Landing he finds in the box what is known as a conductor's bill made out by [fol. 70] the shipper and on the bill he indicates as to what the route would be.

Mr. Dickman: I don't believe I have anything further.

Exam. Bradford: Is there any redirect?

OFFER IN EVIDENCE

Mr. Porter: No, there is not.

I offer Exhibit 6.

Exam. Bradford: Any objection?

Mr. Dickman: No objection.

Exam. Bradford: Exhibit 6 is received in evidence.

(Applicant's Exhibit No. 6, Witness Kline, was received in evidence.)

(Witness excused.)

Exam. Bradford: And I think we will recess for lunch at this time.

Off the record for now.

(Discussion off the record.)

Exam. Bradford: On the record.
We will come back at 1:30.

(Whereupon, at 12:15 p.m., a recess was taken until 1:30 p.m. of the same day.)

[fol. 71] Afternoon Session—1:30 p.m.

Exam. Bradford: Gentlemen, let's come to order, please, and we will proceed with the hearing.
Mr. Kline has been recalled.
Mr. Porter: For just one point, Mr. Examiner.

JAMES H. KLINE was previously sworn and testified further as follows:

Further redirect examination.

By Mr. Porter:

Q. Mr. Kline, you stated you could deliver a car from Sunrise Landing to The North Western at Little Lake the same day and to Milwaukee at Republic the following day. Can you compare the times when those, what it would take to return those cars to your line at Little Lake and Republic Junction respectively?

A. We made a check of that last winter when the movement was heavy because we were very much concerned with our car supply and, of course, wanting to avoid the borrowing of cars from foreign lines, which costs per diem charges, and even though there was one more day involved going to the Milwaukee, it seemed they apparently had quite an advantage in getting the cars back to us, because we found they were returning the cars in four to five days, whereas the Northwestern took longer and usually two or three days, at least, longer. I don't know why, unless it was moving through their terminal at Escanaba, and traveling quite some greater distance, too, delivering the cars [fol. 72] at the Milwaukee at Iron Mountain. I don't know

the details of that, but I know the actual figures showed the Milwaukee return of empties was decidedly in favor of that line on the basis of time involved.

Mr. Porter: That is all, Mr. Examiner.

Mr. Dickman: No questions.

Further recross examination.

By Mr. Beckley:

Q. That is the return of empties to your line?

A. That is right.

Q. You still had to move them from Republic all the way back to Sunrise in the case of cars received from the Milwaukee and the movement was only from Little Lake, a much shorter distance in the case of Northwestern?

A. Yes, it is a lot shorter.

Exam. Bradford: The witness is excused.

(Witness excused.)

Mr. Porter: Mr. Leonard Smith.

Leonard C. Smith was sworn and testified as follows:

Direct examination.

By Mr. Porter:

Q. Mr. Smith, would you state your name, address, and occupation?

A. Leonard C. Smith, Traffic Manager, Lake Superior & Ishpeming Railroad Company, Lake Street and Main—Lake Street and Washington is our address, Marquette, Michigan.

[fol. 73] Q. How long have you been traffic manager of the Lake Superior & Ishpeming?

A. Well, at this time I will have been traffic manager only for about three, four, years. I came to the LS&I as general freight and passenger agent December, 1946.

Q. And in what capacity did you come there?

A. To manage the traffic department.

Q. So you have been in management of the traffic department, or traffic manager since 1946?

A. That's right.

Q. What had been your previous traffic experience, if any?

A. Well, I can go back quite a ways.

Q. Well, go back.

A. I go back to September, 1912. I started out with the Soo Line as an office boy and I worked through seventeen years with the Soo Line in Duluth and Superior, Duluth, Minnesota, and Superior, Wisconsin, in varying capacities, clerical, guard work, warehouse work, cashier, that is all with the Soo Line for seventeen years.

Q. Then what did you do?

A. I left the Soo Line and started with the Duluth, South Shore and Atlantic Railroad in Duluth, Minnesota, in May of 1929, as chief clerk to the traffic manager, and after that I spent seventeen years with the Duluth, South Shore and Atlantic Railroad, ten of which was as chief clerk; one as [fol. 74] general agent at Detroit, Michigan, and, oh, there was a couple of years in there, assistant general freight agent, and I wound up, last part of November, 1946, in the capacity of general freight agent.

Q. At?

A. At Marquette, Michigan.

Q. So that, at least, since 1946 you have been at Marquette, Michigan, is that right?

A. I have been in Marquette, Michigan, since 1939.

Q. 1939. And during all of that time have you worked with freight rates and charges for these railroads?

A. Yes, I have.

Q. And are you a member of the Western Trunk Line Freight Traffic Managers' Committee?

A. I am and have been for the past seventeen years.

Q. I take it that that has given you entire familiarity with the rate structure in this area, has it?

A. It has.

Q. And specifically with respect to the structure on logs, chemical wood, pulp wood, and that sort of traffic?

A. Yes.

Q. And by this area I am referring to the upper peninsula of Michigan as well as the adjoining areas of Wisconsin.

A. I am familiar with all.

Q. Yes. Now, in making the rates on the various descrip-
[fol. 75] tions of forest products do the railroads of the upper peninsula apply a general basis or formula?

A. Yes, they do.

Q. Please state what that is with respect to saw logs.

A. For manufacture and reshipment?

Q. Let's clear that up first. Do you have two bases of rates for saw logs, one being manufacture and reshipment and the other for local application?

A. We have one we call a flat rate.

Q. Flat rate?

A. Yes.

Q. And do saw logs universally move on the manufacture and reshipment basis originally?

A. Yes, they do on the M&R.

Q. Will you state what the rate formula is or general basis is for saw logs, manufacture and reshipment?

A. The general basis is, it has been my experience to participate in one general recognized, prescribed by the Interstate Commerce Commission in Docket 23424 and it is a citation, 192-ICC-199. That basis has been in effect for approximately thirty years for single line application and, of course, over the years that basis has been treated with the general increases. I might back up and say that this basis became effective prior to what is known as Ex Parte 123. And since then we have had several ex parte increases which has brought the single line rate up substantially.
[fol. 76] Then to make a two-line rate we would go back to this basic rate that was authorized by the Commission at three cents and that three-cent rate has been treated with all the general increases in the ex parte increases over the past several years. That would be your treatment for a two-line rate. And for a three-line rate we go back again and pick up that basic single line and add five cents and treat it with the general increases under the ex parte proceedings, the last of which was 212.

Q. What has been the effect of the general ex parte increases? Today how do the two-line rates compare with single line and how do three-line rates compare with single line?

A. From my research on the subject it appears that these arbitraries produce for two lines a seven-cent spread that has grown from the single line scale as compared to a twelve-cent spread for the three line spread over the single line rate.

Q. All right. By the way, is that basis that you have described in use generally by Western Trunk Lines?

A. It is generally accepted by the Freight Traffic Managers' Committee and the Standing Rate Committee. It is a formula generally used throughout Michigan, Wisconsin, and other nearby states.

Q. All right. And by the railroads themselves?

A. That is right.

Q. And what is the basis used for chemical wood?

[fol. 77] A. Well, again we have a basic single line scale that is employed at what we call the Ex Parte 16811. That is a mileage scale of multiples of five, ten, fifteen, and so on, to which is added an arbitrary of two cents per hundred pounds and, of course, this is treated with your last ex parte increases, 175169, 206 and the last, 212. 212, of course, didn't take effect on Michigan intrastate traffic.

Q. What about three-line rates on chemical wood?

A. Well, chemical wood is one of the lowest grade of forest products. To my knowledge there is no movement of chemical wood over three lines and no rates for three-line movement have been requested.

Q. And none provided in tariffs?

A. And none generally provided in tariffs.

Q. What is the basis governing rates on pulp wood?

A. Here again you have a single-line scale that comes into the picture and becomes a pattern much the same as we have on saw logs. The basic arbitraries for two-line movements are made by adding one cent to the origin to destination mileage for the two-line haul and two cents to the single-line scale for three-line movement. The tariffs that I'm familiar with and that are in use right at the

moment would be subject to Ex Parte 196 and 206 increases. 212 increase did not become effective.

Q. Is the same method of making rates, that is, by adding arbitraries to single-line rates for joint line, two- or three-[fol. 78] line application used for making rates on other low grade, low rated commodities in this territory?

A. Yes.

Q. Can you name some of those commodities?

A. Well, sand, gravel, crushed stone, limestone, other road building commodities, are treated as such.

Q. Now, as a rate maker, what is the purpose and justification for these arbitraries?

A. Well, I believe that our Freight Traffic Managers' Committee and those assigned to take care of rate adjustments for the carriers realize that these additions are necessary to compensate the railroads for the additional cost involved in the interchanging of traffic and handling of traffic in two- and three-line movements above the cost of the single line.

Q. Are these formulae or bases of rates in employment generally in the upper peninsula and in the State of Wisconsin and governing traffic between the two states in this area?

A. Yes.

Mr. Porter: May I have one moment, please?

Exam. Bradford: Surely.

By Mr. Porter:

Q. Mr. Smith, have you compiled an exhibit showing the traffic of logs and chemical wood together with the revenue descriptions of the same moving over the connection involved in this case from the opening of that connection until the last of July of this year?

[fol. 79] A. I have.

Q. And is that the exhibit which is being now identified as Exhibit No. 7?

A. It is.

(Applicant's Exhibit No. 7, Witness Smith, was marked for identification.)

By Mr. Porter:

Q. Does this exhibit to the best of your knowledge correctly show all of the traffic of this category which during that period moved over that connection together with the origin, the destination, the description of the commodity, and the division of the revenues derived from the same?

A. Yes.

Q. Does the exhibit require, do you think, any particular explanation or does it speak for itself?

A. I think it speaks for itself. Somebody will probably ask the question, why do you show November and December down to April and a gap in there. Well, there wasn't any movement during May and June and that is why we pick it up this way.

Q. You mean there wasn't any movement of these commodities or there wasn't any movement over this connection?

A. There wasn't any movement of these commodities, put it that way.

Q. Wasn't there movement over the Northwestern at Little Lake during those months?

A. Yes.

[fol. 80] Q. There was a movement of the commodities but not over the connection?

A. Yes, that's right.

Mr. Porter: That completes my direct, Mr. Examiner.

Mr. Beckley: May I check with my traffic manager for a minute.

Exam. Bradford: Sure.

Mr. Witness, it is my understanding from Exhibit 7 that you show the number of cars, the origin and destinations and the proportion of revenue produced by this traffic which was received by the LS&I and also by the Milwaukee?

The Witness: That is correct.

Exam. Bradford: And also the percentage of revenue received by each, is that correct?

The Witness: That is right.

Exam. Bradford: I notice the division seems to be either thirty per cent the Milwaukee or twenty-eight per cent for

the Milwaukee. What determines that? Is that the destination that determines that?

The Witness: No. It is the commodity. I suppose what is bothering you, on the very first line it shows seventy per cent for the LS&I on logs and you step down four items and you notice it is seventy per cent on chemical wood. You know, we have clerks in our organization, too, and I went back this morning and made a check on this to see if I was [fol. 81] off the beam and I found that it should be seventy-two per cent and through our negotiations, by making what we call statements of differences, we will go to the Milwaukee Road and change that to seventy-two, about a hundred and ninety-six dollars additional.

By Mr. Porter:

Q. I think, getting back to the Examiner's question, the question, they decide the difference, seventy-two and seventy, the seventy-two applies to the saw logs and seventy applies to chemical wood?

A. That is right.

Exam. Bradford: You may cross-examine.

Cross examination.

By Mr. Beckley:

Q. Mr. Smith, earlier in this case Mr. Kline testified that the rate in effect currently between Sunrise Landing and Ironwood is twelve cents a hundredweight on chemical wood and thirteen cents on saw logs.

A. You said Ironwood or Iron Mountain?

Q. Iron Mountain, excuse me. Are those rates equal to the rates that you would get by applying the prescribed Docket 22444 rates and the various increases since that time?

A. No, sir.

Q. Isn't it a fact that those rates are, in fact, very much lower than the scale rates?

A. That is true.

Q. So that for virtually all of this movement the scale rates do not apply?

[fol. 82] A. That is correct.

Q. Now, if the scale rates applied, you testified there would be a seven-cent spread for two-line movement over a one-line movement. Now, if somehow or other the line of the LS&I were extended to Iron Mountain, do you mean there would be a five-cent rate on chemical wood from Sunrise to Iron Mountain on a single-line haul?

A. That is the difference between the single line. The rates have increased over the years so the spread above the single line rate has grown.

Q. So that it is now a seven-cent spread?

A. Yes.

Q. Now, you have a total rate of twelve cents on chemical wood. If we deduct the spread of seven cents in determining a single-line rate, we come out with five cents, is that right?

A. That is one way to read it, but you are overlooking something.

Q. So that, as a matter of fact, in standing rates in the upper peninsula you don't spread seven cents on two line or twelve cents on a three-line scale?

A. Oh, yes, we do. We have lots of rates established on that scale.

Q. These rates, of course, are not?

A. That is right.

Q. And presumably if you did have a spread on rates of [fol. 83] this level, it would be very much narrower, is that right?

A. Say that again.

Q. Wouldn't your spread be a lot narrower than this seven- and twelve-cent spread you have been testifying about?

A. Circumstances take care of that.

Q. So that the seven-cent spread for a two-line movement and a twelve-cent spread on a three-line-scale movement are not in universal application in the upper peninsula?

A. I would say they are.

Mr. Porter: I wonder if you understood the question, universal?

The Witness: What do you mean by universal?

Mr. Porter: He means always. Here they are not.

A. (Continuing) We have to depart from the scale when competition enters into the picture.

By Mr. Beckley:

Q. You spoke of saw logs moving on M & R rates. In order to take advantage of those M & R rates is it not necessary for the saw mill to ship out equivalent amounts of finished lumber by rail to that which he receives on the M & R rates?

A. I wouldn't be able to tell you the equivalent amount. That is in the hands of the consignee. They have to have a measure of saw logs in and produce a certain amount of lumber out to gain the use of these low rates.

Q. And if the lumber moves out by truck, they don't get these low rates in, is that right?

[fol. 84] A. No—that's right.

Q. And is it customary to make some annual readjustment of the M & R rates to take into account that which may have been diverted into truck?

A. That is right.

Exam. Bradford: Well, you mean an adjustment of the rate or of the revenue?

Mr. Beckley: Of the revenue.

By Mr. Beckley:

Q. As I understand it, and correct me if I'm wrong, inbound shipment pays the low rate initially?

A. That is right.

Q. And if it is later determined that all of that inbound rail saw log was not diverted to outbound rail but some diverted to truck and a higher rate applied, inbound, and that must be collected from the saw mill operator?

A. Your understanding is correct.

Mr. Porter: It wouldn't have to be diverted to truck, it could be another railroad?

The Witness: Yes, another railroad, and that would still void their credit.

Mr. Beckley: I think that is all.

Mr. Dickman: I think that is all.

Mr. Porter: I offer Exhibit 7, Mr. Examiner.

Exam. Bradford: Any objections?

Mr. Dickman: No objections.

[fol. 85] Exam. Bradford: It is received in evidence.

(Applicant's Exhibit No. 7, Witness Smith, was received in evidence.)

Mr. Porter: I have no redirect.

Exam. Bradford: The witness is excused.

(Witness excused.)

R. E. DAVIDSON was sworn and testified as follows:

Direct examination.

By Mr. Nagle:

Q. Would you state your full name for the record, please?

A. R. E. Davidson.

Q. By whom are you employed?

A. Kingsford Company, Iron Mountain, Michigan.

Q. And what is your occupation with that company?

A. Director of wood procurement and land.

Q. And just generally what are your duties with the company in that position?

A. Well, I have to arrange to get the wood in the plant, the storage of this wood, purchase of saw log that we saw into lumber, direct the operation of the saw mill and lumber storage, and that's about it.

Q. Full time job. Generally what is the business of the Kingsford Company?

A. Charcoal.

[fol. 86] Q. You make charcoal, sir?

A. That is right.

Q. And your location is at Iron Mountain, Michigan?

A. That's right.

Q. Have you had any other locations, do you have any other plants throughout the country?

A. We have one at Belle, Missouri, we have a booster plant for our Iron Mountain plant to manufacture charcoal at Spring Green, Wisconsin.

Q. Mr. Davidson, if you would, and if you would like to tell us, how does your company rank nationally among the companies producing charcoal?

A. We are rated No. 1 in volume, in production.

Q. Do you carry on any other business other than making charcoal at Iron Mountain?

A. Yes, our hardwood lumber business is our No. 2 item and juvenile furniture is No. 3.

Q. I take it you actually make lumber down there?

A. We produce lumber from the saw logs, yes.

Q. And incident to all your production at Iron Mountain I take it it is necessary you bring in some logs to make these commodities?

A. That is right.

Q. And what sort of inbound raw materials do you use, sir, specifically what are they called?

[fol. 87] A. Chemical logs and saw logs, various types of saw residue.

Q. And at the present time is any of that traffic moving into your plant by rail?

A. Some of it.

Q. And some also moving in by truck?

A. A large percentage of it.

Q. Is your company equipped to handle this inbound raw material when it comes in by truck?

A. Right.

Q. How long have you been so trucking the raw material?

A. We trucked a small amount in, I'd say two to five per cent up to the last year, and we have gone to fifty per cent or more in the last year.

Q. Trucking is not new to you?

A. No.

Exam. Bradford: Do you operate your own trucks?

The Witness: No.

Exam. Bradford: Or is it motor carrier?

The Witness: Motor carrier, well, private motor carrier and motor carriers, practically all private carriers.

By Mr. Nagle:

Q. Mr. Davidson, are you familiar with the total number of cars and chemical and saw logs that your company might receive in a given period, a year or other period?

A. That is right.

Q. What might those be?

[fol. 88] A. From all of our sources or just this area?

Q. Let's say from all of your sources into the Iron Mountain plant, all your rail shipments.

A. I would just as soon not reveal that.

Q. Excuse me. Would you have any objection to revealing the extent of your rail movement on those commodities from the areas around Sunrise?

A. I'd just as soon say that. It is around sixty-five cars of chemical logs per week and fifteen to thirty cars of saw logs per week.

Q. That is the per week averages throughout the year?

A. That is right.

Q. Now, is your company presently receiving these commodities from Sunrise Landing, sir?

A. That is right.

Q. And have you ever received these commodities from Seney, Michigan?

A. That's right.

Q. And who was your supplier of these commodities up in that area?

A. We purchased from the Cleveland Cliffs Iron Company.

Q. And who controls the actual shipment of that traffic?

A. We do.

Q. Do you pay the freight charges, sir?

A. That is right.

[fol. 89] Q. And do you direct the Cleveland Cliffs Company as to how you want the traffic routed?

A. That is right.

Q. At the time that you were using the station at Seney to move your logs down to Iron Mountain what routes were available for you on that movement?

A. The DSS&A to Champion, Champion to Iron Mountain on the Milwaukee road, and DSS&A to, I think it was

Little Lake but I am not sure. Ishpeming. Yes, Ishpeming down to Iron Mountain on the Milwaukee road and from the Milwaukee to the Northwestern and from the Northwestern to the Milwaukee road.

Q. The last leg you mentioned, that is just a switch haul?

A. That is right.

Q. Maybe we ought to establish that now. What railroads directly serve your plant at Iron Mountain?

A. Milwaukee.

Q. So when you refer to the Northwestern that is through reciprocal switching?

A. That is right.

Q. So in the past when you moved out of Seney you had two routes available, both of which were two-line routes?

A. That is right.

Q. Now, with respect to your movement from Sunrise Landing, at the present what routes are available to you there?

A. We can go to Little Lake on the LS&I, from Little [fol. 90] Lake to Iron Mountain on the C&NW to Milwaukee into our yard or we can now go from LS&I to Republic Junction and transfer with the Milwaukee road.

Q. So that at the present time out of Sunrise Landing you have much the same that you had out of Seney, in other words, two routes, both of which are two lines?

A. Yes, that's right.

Q. There has been some testimony on this point, Mr. Davidson, with respect to the M & R transit privileges. Do you have occasion to make use of that privilege?

A. Well, we are forced to give a certain amount of business to the Northwestern and a certain amount to the Milwaukee road depending on our outgoing shipments. We can't say that it will be fifty per cent, but maybe over this period the Northwestern will get sixty per cent and maybe over the next period the Milwaukee Road might get sixty per cent, and whatever per cent goes out we have to balance it incoming.

Q. And so your percentages to some extent—well, to some extent depend on the location of our outbound customers?

A. That's right, we endeavor to get it as near equal as we can because two-line services—

Q. (Interrupting) At the present time since you have two routes, a route over the Milwaukee and a route over the Northwestern—

A. That's right.

Q. (Continuing) —you can benefit from the M & R rate?

[fol. 91] A. That is right, we do.

Q. And all of your saw logs move on that M & R?

A. Right.

Q. There was testimony of Mr. Kline of the LS&I that a representative of your company had made a request to make the connection with the Milwaukee Railroad. Could you tell us who that party was?

A. I did.

Q. You yourself?

A. That is right.

Q. What was your purpose?

A. We have to balance our saw log movement out on this manufacture and reshipment and we had no way of getting the saw logs in from Sunrise Landing except on a three-line haul and on the Milwaukee Road to balance it out, otherwise all of our saw logs would have had to come from Northwestern, and we can ship all of our lumber out on the Milwaukee.

Q. If all came out of the Northwestern you had occasion to ship outbound on the Milwaukee, you would lose your M & R privilege?

A. That is right, and we couldn't afford a three-line haul on saw logs.

Q. You say you have to?

A. That or else truck the load.

Q. Now, Mr. Davidson, if as a result of these proceedings the Interstate Commerce Commission should order that [fol. 92] the Republic Junction be discontinued and if the resulting routing on your saw logs would then be by the LS&I, then the DSS&A, and then the Milwaukee, and if that routing in turn should result in a higher rate to you by reason of the inclusion of the third carrier, what effect, if any, would that increased railroad rate have upon your continued use of rail service?

A. We would be forced to buy our saw logs elsewhere or truck the logs. We couldn't stand any increases in saw

log movement at the present time. In fact, we have been demanding a decrease in rates, which we just recently got.

Q. Have you made an investigation as to whether or not it would be feasible for your people to truck logs from the Sunrise area, from the Sunrise Landing area?

A. We made a careful study of that and there is a report written to that effect.

Q. And do you believe that if the present rail rate on those logs were increased that your company would revert to trucking?

A. I know they would.

Q. Would you refer to this Exhibit No. 1, Mr. Davidson? It is a map of the railroads in this area.

Now, are you familiar with the routing that the Milwaukee employs in its movements from Sunrise Landing to your plant at Iron Mountain, or the routing of all the carriers in that particular movement?

A. Well, the LS&I accepts the wood at Sunrise Landing [fol. 93] and delivers it to Republic Junction. I am not familiar with the exact time but—

Q. Not necessarily time, sir.

A. (Continuing) —but it is then picked up by the Milwaukee Road at Republic Junction and delivered into our Iron Mountain plant.

Q. Comes right down to that plant for delivery to your plant at Iron Mountain?

A. In other words, it is picked up shortly after midnight and in our plant the next morning between 10:30 and 12:00.

Q. To your experience have you shipped from Sunrise, too, on the Northwestern?

A. That is right.

Q. Based on your experience in those movements, how does it move from Sunrise when it comes to the Northwestern?

A. It goes from Sunrise Landing to Little Lake, Little Lake to Escanaba.

Q. That is on the Northwestern?

A. That is right, Escanaba to Powers on the Northwestern, Powers to Antoine Junction, which is north of Iron Mountain, on the Northwestern and sent on the transfer

and picked up on the Milwaukee and delivered to the plant at Iron Mountain.

Q. How many Northwestern trains are involved in that movement, if you know?

A. I couldn't be exact, but I would think it would be [fol. 94] the railroad company to answer that. If I were to answer it, I would say probably three, but I don't know how true that is. That is on the Northwestern we are talking about.

Q. In other words, move in on a train into Escanaba, a train to Powers, and to Antoine, which is the transfer point?

A. I assume that. That you would have to check. I know that they stop in Escanaba, I know they stop in Powers and Antoine.

Q. Now, based on your experience between the two routings, have you determined whether one or the other is faster?

A. Well, the Milwaukee route is faster via Republic Junction.

Q. And what do you find the time on Milwaukee Road to be, what has been your experience on that?

A. As I say, I can't say exactly how long it comes from Sunrise Landing to Republic Junction, but I do know that when we call to Ishpeming we know exactly what is coming in the following day.

Q. Do you have any experience as to how long it takes on the Northwestern from the woods to your plant?

A. Well, it is a shorter period of time than it was a year ago. I would say on an average four days, sometimes six days, but I think a four-day average would be fairly exact.

Q. Now, is time in transit at all important to your company?

A. In the summer months it is very important.

Q. Why is that?

A. We deck no saw logs in the summer. We insist to [fol. 95] the C. C. I. Company that they cut that log and have it in ten days from the time it is cut. We insist it is in there so we can cut it in ten days so that the lumber will not stain.

Q. So it will not stain?

A. Yes.

Q. Is there a problem in the summer?

A. Yes, the sap is in the tree and we like to cut the tree as rapidly as we can.

Q. So the extent that you can receive faster service over the Milwaukee routing than the Northwestern routing, would that faster service be of benefit to your company during these periods?

A. It would in the summertime.

Q. Have you had any specific trouble with movements that have come over the Northwestern?

A. What do you mean by troubles?

Q. As far as obtaining cars as fast as you had wanted them or needed them, sir?

A. We have had a few instances in summer where we would have liked to have had our saw logs sooner than we did and possibly three times this summer that they have piled up at Powers, Michigan, and we would liked to have had them into our plant.

Q. When the cars were sitting at Powers, Michigan, did you make any inquiry to the Northwestern or any attempts to obtain them?

A. That is right.

[fol. 96] Q. And will you tell us who you called and who you contacted and what happened?

A. I can't tell you who I contacted. I called for Mr. MacCarthy at Green Bay and I called for Mr. Murrell at Escanaba. But in the three instances this happened they in turn happened to be out of the office and I did not get to contact them, and in contacting someone I asked for the train master at Escanaba, and I am not certain who I talked to, I wouldn't say it was the train master, and I asked him if he would give us service the following day when I found out our saw logs were there, and he endeavored to do such. He said, at least, he said he would give us some better service the next day. But the following day the logs were not picked up because the south train coming north was loaded too heavily to pick up our load.

Q. How long were they tied up in the specific instance you are talking about?

A. I know of two times. It was two days and another time it was three days.

Q. Did your company suffer any damage because of that?

A. Yes, I am forced to send our saw mill crew home if we don't have the saw logs to saw. We pay the four hours and send them home.

Q. You found it necessary to send them home?

A. Three times this summer is all.

Q. Have you had any experience moving over the present Milwaukee?

[fol. 97] A. We haven't had any saw logs on our recent routing until last Friday when we received our present car. We have given everything to the Northwestern.

Q. Do you find that there is any advantage or any difference in the ease with which you are able to check on the location of your cars when it is routed either over the Northwestern or Milwaukee?

A. It is very simple to check on the Milwaukee and LS&I shipments. I called Mr. Fredrickson at Ishpeming and he tells me what has gone through and what we will expect the next day, and we get that.

Q. Mr. Davidson, do you have an opinion whether the continued existence and the operation of the connection at Republic Junction is of benefit to your company?

A. It is a great benefit to our company or we wouldn't have asked for it.

Q. Do you feel its continued operation is necessary in the future operation of your company?

A. Well, I would say yes, if we continue to buy our saw logs from Cleveland Cliffs Iron Company, and we would like to do that.

Q. Was it your testimony, Mr. Davidson, you had found the Milwaukee routing service to be faster in general than the Northwestern?

A. Oh, yes, much faster.

Mr. Merrill: May I have a question of him?

[fol. 98] Exam. Bradford: Certainly.

By Mr. Merrill:

Q. I notice from Exhibit No. 7 that there has been a substantial number of carloads of logs moving from Iron Mountain to Ewalt's Larding beginning last November and continuing January, February and March, and apparently indicating that there has been a movement of logs to your company at Iron Mountain via Republic Junction. Your indication was that you had not received any logs via that junction. Did you mean in recent months?

A. I was thinking from the break-up period this year. We have received one today, I would say one, not over three cars from that area in the break-up period. But from the time Ewalt's Landing was built and constructed we did receive quite a few saw logs last fall.

Q. What do you regard as a break-up period, Mr. Davidson?

A. We base it on March 15, whether it is or not. There is a certain amount of logs decked at that time.

Q. Mr. Davidson, what has been your experience in tracing cars moving into your plant via the Milwaukee, have you been able to locate them promptly?

A. That is simple. We call Mr. Frederickson at Ishpeming and he tells us what has gone through there that day and we know we will get it the next morning between 10:30 and 12:00.

Q. And what has been your experience with respect to the even inbound flow of the cars via the Milwaukee versus [fol. 99] via the Northwestern? Do they come in more evenly via the Milwaukee than the Northwestern?

A. Yes, I think it would be. However, of late we have gotten better service from the Northwestern than we did sometime ago. But we get a certain amount on the Northwestern. There are times when they do pile up, but not to any great extent.

Q. The service in that connection is comparable, I presume. Is that right, Mr. Davidson?

A. That is right.

Mr. Nagle: Nothing further.

Exam. Bradford: You may cross-examine.

Cross examination.

By Mr. Beckley:

Q. Mr. Davidson, you are familiar in general with the country where these saw logs and chemical woods originate?

A. That is right.

Q. And from your experience which has extended over several years in that general area?

A. That is right.

Q. Now, are the saw logs and chemical wood that you are getting at Sunrise Landing coming from the same general area as those you used to get from Seney on the DSS&A?

A. That is right.

Q. Now, were you satisfied with the service you were getting out of Seney on the DSS&A when we had this routing by way of both the Milwaukee via Champion and [fol. 100] the CNW via Ishpeming?

A. We were satisfied with the service.

Q. So long as we are into it, will you explain whatever qualms you may have had on the DSS&A, service?

A. We couldn't complain about the DSS&A service.

Q. How come the log loading moved from Seney to Sunrise Landing?

A. Well, I think it is because of a lot of pressure we may have exerted on the Cleveland Cliffs Company. We had to pay quite a terrific price to get the logs trucked from the Sunrise area to Seney and we were of the opinion that if we had some way of getting those logs trucked into Cusino, Camp 15, or Williams Crossing, that it might be better or extend a line to where the timber was located.

Q. Well, at that time there was quite a spread of rates between Seney and Iron Mountain and Cusino and Iron Mountain, is that right?

A. That is right.

Q. Were you aware of the fact that the rate proposed from Sunrise Landing by the LS&I when it made its application was identical with that from the DSS&A from Seney?

A. No, we didn't know about it until we got it.

Q. Were you aware in making the application to the Commission the LS&I contemplated movement of all of the wood to Iron Mountain from this extension via the Northwestern?

A. I don't think they did.

[fol. 101] Q. You were not aware of the fact that they represented to the Commission that all of the movement would be in connection with the C&NW?

A. I didn't know anything about that.

Q. Assuming that you could get the timber laid down in Seney for the same price as you could get it at Sunrise Landing and assuming that the DSS&A meets the rate from Sunrise to Iron Mountain on its rate from Seney to Iron Mountain, would you have any objection to the transfer of the loading to Seney?

A. No.

Q. And it would do away with the need you recognize for this additional route via Republic Junction?

A. That is right.

Q. In other words, if the saw logs and chemical woods were put on the DSS&A at Seney, you would have no need for the junction at Republic with the LS&I?

A. If we were put on at the same price to us,

Q. When you purchase chemical woods and saw logs from Cleveland Cliffs do they specify the loading point or do you?

A. They usually specify it.

Q. And if they were willing to specify a loading point of Seney, there would be no need for this new connection?

A. Well, if they could put those logs into Seney at the price we wanted, I don't think Ewalt's Landing would have ever been built.

[fol. 102] Q. But you have already suggested you thought you were going to get the Cusino rate from this extension, which was considerably lower than the Seney rate, as I understand it?

A. No, I didn't say that.

Q. Oh, I misunderstood.

Exam. Bradford: Are you through?

Mr. Beckley: Yes, I am through.

Cross examination.

By Mr. Dickman:

Q. Mr. Davidson, approximately what percentage of your inbound wood movement is chemical wood?

A. Well, right at the present time—you mean from this particular area?

Q. All right, for now, yes, from this particular area.

A. We receive sixty-five carloads of chemical wood and fifteen a week and fifteen to thirty, twenty-five to thirty-five cars of saw logs a week. Let's start over again. When does the period start, when Ewalt's Landing was built?

Q. No, I am speaking generally. You testified that your main product was charcoal and second was producing lumber?

A. That's right, hardwood lumber.

Q. And producing furniture?

A. Yes.

Q. I would like to have a general estimate of you as to what percentage of your inbound wood is chemical wood from this area.

A. Well—

[fol. 103] Q. (Interrupting) I assume you get more chemical wood?

A. That is right. We get sixty-five cars of chemical wood a week compared to an average of twenty-two and a half cars of saw logs during the course of the year. That is right.

Q. That is about a third as many?

A. That is right.

Q. And of those saw logs which come in on a M & R rate, what percentage of your lumber goes out, I mean how many points that are purely local to the Milwaukee does your distribution go to.

A. I couldn't say on the distribution. I can only tell that we have shipped so much out on the Northwestern and we have to ship in a certain amount of saw logs into our plant to offset our outgoing shipments in lumber.

Q. I see. You get all your saw logs from Sunrise?

A. Practically. Not all.

Q. What other points?

A. We truck in a few points.

Q. You don't get any rail saw logs from any other location?

A. Yes, we do; Frost, Michigan.

Q. Frost, Michigan?

A. Yes, a siding on the Milwaukee Road.

Q. Is a siding on the Milwaukee Road?

A. That is right.

Q. Is that M & R tonnage, I mean is that movement on the M & R rate?

[fol. 104] A. That is right.

Q. Couldn't you use that tonnage to apply on your outbound?

A. I think we do.

Q. You do. You feel you need more?

A. Need more tonnage?

Q. Need more M & R tonnage inbound on the Milwaukee?

A. Oh, yes. What little bit we get from Frost doesn't amount to anything what we get here.

Q. Oh, I see. I had no way of knowing. Mr. Davidson, you don't need M & R rates on your charcoal, chemical doesn't move on M & R?

A. No.

Q. You can move it out any way you want to?

A. That is right, as far as I know.

Q. I believe you stated in your direct that the service of the Milwaukee via Republic you thought was faster than the Northwestern via Little Lake, didn't you testify to that?

A. That is right.

Q. Now, were you talking about the entire move from Sunrise Landing to your plant or did you just mean that it was quicker to get the logs Republic to your plant than it was from Little Lake to your plant?

A. I will put it like this. It is quicker to get the logs from the time I know about them into our plant via the Milwaukee Road than it is by the Northwestern.

[fol. 105] Mr. Nagle: By the time they are loaded?

The Witness: The time I know about it. I can't tell you how long it takes to get from Sunrise to Republic Junction on the LS&I. I assume it is a day and a half, but I don't know, nor can I tell you how long it takes from Sunrise Landing to Little Lake via the LS&I. But I do know I can call Ishpeming and get information that we know what we are getting the following day; and if I call Escanaba, it is rather difficult for me to find out what is going to be from Little Lake to Iron Mountain within two or three days.

By Mr. Dickman:

Q. You mean it is difficult for you to find out?

A. If I do get the information, a record of six logs and six chemical, I might get ten logs and six chemical.

Q. It is difficult for you to get the information, you mean you can't find them?

A. When I find them and talk to people, I can't get the information because they are sent to Powers on 3 coming north. They mean right when they tell me, but I don't get the wood.

Q. I thought you said that there was only three times last year or during some period when your logs piled up there at Powers?

A. Three times that it hurt us, that I had to send our saw mill crew home.

Q. I see.

A. Yes.

[fol. 106] Mr. Dickman: I don't believe I have anything further.

Exam. Bradford: Any redirect?

Redirect examination.

By Mr. Nagle:

Q. Mr. Davidson, although there were only three times this summer that you had to send your crews home by reason of no logs, were there other times you suffered delay over the Northwestern?

A. Yes, but we can't entirely blame the Northwestern on that. But we have endeavored to get from the depot

agent to get the information. We can call the Milwaukee depot agent and they can check with Ishpeming and can talk over lines not quite as expensive as ours. But whenever we ask the Northwestern to check for us we do not get that information as reliably as it should be. But that is not their fault. It is not the agent's fault. It is such a thing as these cars piled up in different places. We always get the cars when they tell us when we get them, not when we think we will get them.

Q. The saw logs from Frost, Michigan, is that smaller, you say?

A. Yes, that is a smaller movement from Frost in saw logs.

Q. How many cars is that?

A. Oh, in the wintertime it is probably three carloads a week. In the summertime we don't even bother.

Q. Now, you had stated that you had, I believe, asked Cleveland Cliffs to start shipping from Sunrise, is that correct?

A. Right at the present time you are talking about?

[fol. 107] Q. Sometime in the past. You said you had exerted pressure on Cleveland Cliffs to ship from Sunrise rather than Seney, is that the effect?

A. Exerted pressure from Sunrise in some form of connection from there so we could get a cheaper rate on chemical logs or we wanted to do our own trucking. We couldn't afford to pay the rate from Seney to Iron Mountain. So, therefore, we complained bitterly.

Q. That is due to the fact that the timber is now closer to Sunrise and, hence, there is not much trucking to the railhead, isn't that true?

A. Well, since I complained the timber is located, most of it, around Sunrise.

Q. So it is most expensive to truck to Sunrise?

A. Oh, yes. You have to truck across, you see.

By Mr. Merrill:

Q. Mr. Davidson, is a reliable service with respect to your inbound chemical wood important to your company as well as logs?

A. It helps; it helps.

Q. In your opinion, would you state your opinion as to whether or not the continuation of this Republic Junction connection is essential to the efficient operation of your business?

A. Well, in order for us to use C. C. I. products we almost have to have it, because we can't accept all of our logs in on the Northwestern, and we can't possibly ship our [fol. 108] lumber on the Northwestern.

Q. C. C. I. refers to Cleveland Cliffs?

A. Right.

Q. And approximately how much of your inbound logs and chemical wood come from C. C. I.?

A. Inbound saw logs about ninety per cent.

Q. And chemical wood about what proportion?

A. Well, a very small per cent.

Q. It is particularly important on the saw logs?

A. That is right.

Mr. Merrill: Thank you, sir.

Exam. Bradford: Mr. Davidson, as I understand it, when you have a movement over the Northwestern it involves a reciprocal movement at Iron Mountain by the Milwaukee?

The Witness: Right.

Exam. Bradford: And is there any time lost in the reciprocal movement that you have? Is that time consuming?

The Witness: Well, the engine that services our yard goes to the north side of Iron Mountain, known as Antoine Junction, and it is picked up there and brought back to our plant if it comes in via the Northwestern.

Exam. Bradford: About how long does it take you to receive the car after it is delivered at the transfer station by the Northwestern?

The Witness: 37 I think should be in Iron Mountain [fol. 109] sometime around 8 o'clock in the morning, we will say between 6 and 8. They get in there from 7 until 12 and 1 o'clock, and if they are not in before 1 o'clock, then the Milwaukee engine can't get them because they tie up at 2 o'clock and they can't get the connection in the same day.

Exam. Bradford: Has that occurred to your knowledge?

The Witness: Oh, several times.

Exam. Bradford: In other words, sometimes your shipments are almost at destination but you can't quite arrange for them?

The Witness: If we need them bad enough, we insist the Milwaukee work overtime to wait for the 37 to bring them in, but that doesn't happen too often.

Exam. Bradford: It is my understanding that regardless of the movement the rate is the same, regardless of the carriers that move the traffic?

The Witness: In other words, you mean whether it is Northwestern or Milwaukee?

Exam. Bradford: That is right.

The Witness: That is right.

Exam. Bradford: Do you know how much the reciprocal charge of the Milwaukee is at Iron Mountain?

The Witness: I know about what it is, but I would just as soon some rail man would answer that.

Exam. Bradford: I presume he will get to that.

I believe that is all I have.

[fol. 110] Mr. Nagle: Nothing further. Can the witness be excused, then?

Exam. Bradford: Certainly.

(Witness excused.)

Joseph J. Meyer was sworn and testified as follows:

Direct examination.

By Mr. Nagle:

Q. Would you state and spell your name for the reporter, please?

A. Joseph J. Meyer, M-e-y-e-r.

Q. What is your address, Mr. Meyer?

A. 4437 North Cramer Street, Shorewood, Wisconsin.

Q. What business are you in, sir?

A. Lumber business and the allied woodenware business.

Q. Do you have any connection with the Amasa, Amasa, Michigan?

A. President.

Q. And how long have you been connected with this company?

A. 1944 is when I started business.

Q. What sort of a business does Amasa Lumber carry on?

A. A typical wholesale hardware business, and of course, we sell forest by-products, such as pulp wood, chemical wood, and so forth.

Q. And you actually use lumber at this location?

A. Produce lumber, yes.

Q. What railroad serves you?

[fol. 111] A. I am served by the Milwaukee Road.

Q. You are not located, I understand, in Amasa, but some other place?

A. It is known as Spur 247 which is approximately two miles out of Amasa.

Q. And the only railroad you have serving at that location is the Milwaukee Railroad?

A. That is right.

Q. Now, instant to your business at Amasa do you have use for products or timber products from the Seney or Sunrise Landing area?

A. At the present time we get all our timber from the—that is the timber that comes in by rail?

Q. Yes, sir.

A. All comes from the Sunrise Landing.

Q. And have you used the rail shipments from Seney?

A. Before Sunrise Landing was in operation we received it through Seney.

Q. I take it at present you also have some truck inbound traffic?

A. We have a little better than fifty per cent of our timber which is inbound truck, practically.

Q. Now, approximately—would your inbound products be—or what would be your inbound products, sir, saw logs?

A. Saw logs mainly.

[fol. 112] Q. At the time you were shipping from Seney what route was employed to your plant?

A. When the merchandise came from Seney it was into Champion and turned over in there to Milwaukee Road

and from there it went to Channing and transferred on their own line right over to Spur 247.

Q. So you had a two-line route at that time?

A. Two-line route, yes.

Q. And your present movement from Sunrise is also a two-line route?

A. It is a two-line route also.

Q. Now, what is your volume of saw logs from these locations, sir?

A. Our saw logs annually from that location run approximately two hundred cars.

Q. Per year.

A. Per year.

Q. And have you had any movements of saw logs from Seney since the inauguration of the Sunrise Landing?

A. Not since that time.

Q. Since that time it has come through Sunrise?

A. That is right.

Q. Now, when you were operating out of Seney you had occasion to use the DSS&A, Milwaukee, and now using the LS&I, Milwaukee. I would like to ask you, based on your [fol. 113] experience between the two methods of shipping, is there one that has provided your company with better service than the other?

A. Well, relative to the service we found that when we were getting our logs from Seney they would come in in greater quantities, that is, from the car movement standpoint. They bunched the cars over. When this was done, I don't know. But we would try to check on the cars and finally they would bring the cars in. And when they did bring them in, we would find four, five, sometimes eight cars in at one time. And in our operation it makes it very bad because these cars must be decked. When there are more cars than we can handle on our siding, that means an extra cost for taking all these logs.

Q. You say you tried to check on it. Did you determine which of the two roads were at fault?

A. Well, the only thing we could do was call up Channing to find out if anything was there. If they were not there, we assumed they were somewhere between that

junction and the Landing because we knew that they were released up at the Landing.

Q. What landing is that?

A. That is the Seney.

Q. And this bunching, as you term it, did it have any adverse effect on your operations?

A. It is costly for us. We have to keep our crews overtime to keep the cars off the rail. Otherwise, we don't have room for the other cars, it is limited space.

[fol. 114] Q. In other words, it makes it difficult for you to unload, among other things?

A. Extra handling.

Q. Were there occasions that by reason of receiving a bunch of the log cars your line was tied up?

A. Not tied up. Several times the Milwaukee Road came in and moved cars around for us at a special request, when the train came down we contacted the station down there and told them about it and they moved the cars so we could help ourselves a little. But the cars had to be unloaded because the log decks are at the end of the spur and those can accommodate five cars at the most. Any more than that, they are right adjacent to the sawmill and that is the place we have to unload our saw wood, our slab wood and our shavings.

Q. Since you have been moving the logs, Sunrise, L.S&I and Milwaukee, have you had this trouble with bunching as you did in the past?

A. None whatsoever. We had the cars come down on the regular basis and there are never more than four at one time.

Q. The extent of the bunching has been eliminated, sir, is that of benefit to your company?

A. It certainly is, and the biggest benefit is we find that we can contact the Sunrise Landing and talk to our man and when he says he is shipping something down, we can almost tell within two or three and a half days definitely [fol. 115] we will have the merchandise in our yard.

Q. Are there any other benefits of that nature which come to your mind, or other benefits in general?

A. We don't have any other particular benefits we can speak of other than that.

Q. You say Spur 247 is two miles from Amasa?

A. About that.

Q. Which direction is that?

A. East.

Q. Is that far from the Northwestern which also serves Amasa?

A. That is right.

Q. Now, Mr. Meyer, if the Interstate Commerce Commission should require that the existing connection at Republic Junction be discontinued, would it be necessary that rail movements into your plant would be a three-line route, isn't that true?

A. That is right.

Q. If the inclusion of the third-line in the routing were to raise the rail rate which you have to pay, would that have any effect upon your continued use of rail?

A. Well, we are at the present time applying for a lower rate for the simple reason that when we started two years ago we had a fourteen cent rate and this rate was continuously raised until right today it is eighteen cents. Now, after checking our operations we find it has been way out of line, so we have also gone into this trucking set up, and [fol. 116] unless we can get that rate down, somewhere in that thirteen-cent limit, we will also be forced to go into the trucking of our logs and, of course, the railroad would not only lose it on the trucking of logs but also logs on the manufacture and reshipment.

Q. So if by reason of the fact the third line would have to be included in the routing and other reasons, the rail wouldn't get the rate down to thirteen cents, you would have to ship by truck, is that right?

A. That is right.

Q. Well, Mr. Meyer, do you have an opinion as to whether or not the continued operation of the Republic Junction connection is of benefit to your company?

A. I definitely believe it is. I believe any railroad connection closer to the source of supply is an advantage over a period of time for the reason it is that much more efficient. I don't think carting logs in a round-about way will make any money for anybody. Eventually someone has to foot that bill.

Mr. Nagle: I have no further direct myself.

Mr. Porter: Just one point I didn't hear. Have you looked into the relative cost of trucking from the woods to Sunrise Landing as compared to Seney?

The Witness: On our particular track this last year there was a difference of seventeen miles in the hauling one way. There was thirty-four miles round trip and there was a difference of three dollars per thousand log feet on the expenses.

[fol. 117] Mr. Porter: Now, if we were to convert to dollars per thousand log feet to cents per hundred pounds, what would that be, can you tell me that, or cents per ton?

The Witness: I think the statisticians will have to weigh that out by weights on different species of the logs.

Mr. Porter: Thank you, that was all I have.

Exam. Bradford: You may cross-examine.

Mr. Porter: In other words, Mr. Meyer, you have a penalty of three dollars per thousand feet if instead of trucking you decide to go back to Seney and ship over the DSS&A?

The Witness: That is right.

Cross examination.

By Mr. Beckley:

Q. Mr. Meyer, are you familiar with the frequency of train service on the Milwaukee prior to the establishment of the Republic Junction?

A. No, I couldn't testify to that. I am not aware of how often these trains run.

Q. How much from Channing to Amasa now?

A. I know there is a train going through there every day because of all the mines in through there and the cars come up on the mine train.

Q. Is the mine a year-around operation?

A. No, it is not.

Q. Outside of the mining season how frequent is the service?

A. Usually every other day. Every second day.

[fol. 118] Q. Were you familiar with the filing of the application for the construction of the east branch extension by the LS&I?

A. We heard about it, but we were not familiar with it. We didn't take any part in it.

Q. Were you aware of the fact that in projecting the traffic from the east branch extension the LS&I represented that there would be no movement to Amasa off that extension?

Mr. Porter: Mr. Examiner, I dislike to object, and I realize that questions are not evidence, but that is the third time that point has been mentioned, and I think in fairness to my client I ought to say at this time that there was no, as I recall it, no representation to the Commission to that effect. It was necessary in making that application, as it is here, in response to the question there to show an estimate of your expenses and revenues and the only route that we had from Sunrise Landing to Iron Mountain, Amasa or any other destination—scratch or any other destination—was via the—let me correct myself a little bit on that. The only route that we had to Iron Mountain was via the Northwestern with interchange at Little Lake. Now, there were routings shown, Mr. Beckley, and I am sure that you will remember and agree with me, via the DSS&A with interchange at Ishpeming and without any destination, particular destination, shown on that traffic, and there was no representation intended to be made to the Commission that the traffic would necessarily move that way, but they were the only outlets that were available to us and if we had shown [fol. 119] an outlet at Republic over the Milwaukee, I can imagine the screaming that would have gone up over the other side, in the light of what we had and what we did show. And I don't want the Examiner to get erroneous opinions from the questions asked.

Exam. Bradford: I am willing to sustain the objection. If they want to bring it out in their own testimony, that is satisfactory. This witness is in no position to testify about that.

Mr. Beckley: He is testifying to need for service from this extension. There were positive representations made at the hearing on the Cusino extension that there would be no movement to Amasa. I don't see how you can come in in this case—

Mr. Porter (Interrupting): If there were, Mr. Beckley, I am in no sense have any recollection of it.

Exam. Bradford: Let's proceed, gentlemen.

Mr. Porter: Or the Spur 247, I presume.

Mr. Beckley: It is the same thing.

Mr. Porter: Doesn't Northwestern serve Amasa—

Exam. Bradford (interrupting): Let's go off the record if we continue this argument. I don't want it on the record.

Mr. Porter: I apologize, Mr. Examiner.

Exam. Bradford: I have sustained the objection to this witness. He is not the proper party to bring it out, to testify about that.

Mr. Beckley: I believe, Mr. Examiner, I asked whether [fol. 120] he was aware of that or not.

Exam. Bradford: Well, regardless of whether he is or isn't, it still is immaterial as far as he is concerned, I mean as far as the testimony of this witness is concerned.

By Mr. Beckley:

Q. When you purchase lumber from Cleveland Cliffs in this area who designates the point at which it is to be loaded?

A. You mean location?

Q. Yes.

A. We naturally discuss with Cleveland Cliffs our routings we feel is best for us. We have to pay the bills, so as a result, it is our materials on the cars.

Q. When you purchase the logs who designates the place where you are to purchase them?

A. We decide right there where would be the best place to put the logs in. At the same time we have to make arrangement for logging contractors to take them out.

Q. Are the logs sold to you in the form of stumpage or in the form laid out at a railroad landing?

A. Stumpage.

Q. Stumpage. I see.

Mr. Beckley: That is all.

Cross examination.

By Mr. Dickman:

Q. Mr. Mr. Meyer, would it be beneficial to you if you were granted M & R routing over the C&NW from Sunrise?
[fol. 121] A. I believe it would be, yes.

Mr. Dickman: No further questions.
Mr. Nagle: No further questions here, sir.
The Witness: Of course that—may I?
Exam. Bradford: Certainly, explanation.
The Witness: That would be a three-line haul over the Northwestern, would it, from Sunrise?
Mr. Dickman: Now, yes.
The Witness: Of course, the rate would determine that, but I wouldn't want a three-line haul on any material I get in there because that would tie it up more.
Mr. Dickman: Of course, I meant the rate would—
Exam. Bradford (interrupting): The witness is excused.

(Witness excused.)

Exam. Bradford: We will take a short recess.

(Short recess.)

Exam. Bradford: We will come to order, please.
Mr. Porter: Could I put on a witness for just a minute to convert that thousand foot figure to pounds?
Exam. Bradford: Be glad to.

E. J. Balda was sworn and testified as follows:

Direct examination.

By Mr. Porter:

Q. Your name and address, please.
A. E. J. Balda.
[fol. 122] Q. You are located where?
A. 11 High Avenue, Oshkosh, Wisconsin.

Q. Mr. Baldo, you are a man of many years of experience in traffic and transportation work, working on freight rates on lumber, forest products, logs, and so forth?

A. Yes, I have been with the Wisconsin Woodwork Travelers Association for five years, handling transportation matters with them for that period of years.

Q. And you have been employed by the Amasa Lumber Company for sometime in that capacity, have you not?

A. Traffic consultant, yes.

Q. Does the Amasa Lumber Company draw hard maple in quantity from Sunrise Landing?

A. About eighty per cent of their logs are hard maple from Sunrise Landing and the weight of that is 13,500 pounds per thousand board foot, log feet—per thousand log feet.

Q. What are the other principal species they get there?

A. Soft maple, that is 11,800, birch, 13,200.

Q. Pine?

A. Nine thousand pounds on the white pine. There is very little white pine in there. Practically all hard maple, eighty per cent, soft maple is ten per cent, and birch and pine the other ten per cent.

Mr. Porter: That is all on direct, Mr. Examiner.

Exam. Bradford: Any cross-examination?

[fol. 123] Mr. Dickman: I have none.

Exam. Bradford: This three dollar rate, are you familiar if that applies on all types of wood or do they vary? As I understand it, the testimony was that it cost three dollars per thousand log feet additional.

The Witness: It is three dollars on any, whether hard or soft maple or pine or whatever it is.

Mr. Beckley: That is a hundred and thirty-five hundredweight per thousand log feet. I may divide a hundred and thirty-five into the three dollars, and come up with 2.2 cents.

The Witness: That is right.

Exam. Bradford: The witness is excused.

(Witness excused.)

Mr. Merrill: Mr. Examiner, at this time Applicant wishes to amend their application to restrict the amount of trackage on the main line of the LS&I Company over which the Milwaukee desires authority to operate. Perhaps the best way of doing it would be to refer to our supplement, to our Section 118 application, the last document filed, Page 9, the third line from the bottom of the page. We desire to amend this supplemental application to substitute for the figure 4,200 feet 1,993 feet.

Exam. Bradford: One thousand what?

Mr. Merrill: Nine hundred ninety-three feet.

Also Page 11, Paragraph 6, the figure $39,335.00 being the estimate value of segment of LS&I main line involved, [fol. 124] should be changed to $22,500 dollars. That follows the reduction in the trackage.

Now, for the benefit of the record, the trackage in question over which authority is sought to operate is from a point in the vicinity designated by the letter E on Exhibit No. 3 to a point in the vicinity of the letter C. That portion of the LS&I main track from a point in the vicinity of C to a point in the vicinity of E.

Mr. Beckley: This could be off the record.

Exam. Bradford: Off the record.

(Discussion off the record.)

Exam. Bradford: On the record.

Mr. Merrill: Mr. Examiner, it has been called to our attention that there was a blank on Page 11 of the supplemental application which we have just corrected. In Paragraph 6 following the words "Milwaukee Road interchange tracks" there should be inserted the figure $14,335.00 in accordance with Mr. Crippen's testimony in this proceeding.

Exam. Bradford: Is there any objection to the amendment?

Mr. Dickman: I am sorry, the last one was in the supplemental application?

Mr. Merrill: Yes, all in the supplemental application, and this is Page 11.

Exam. Bradford: The amendment is granted.

Mr. Merrill: Thank you, sir.

[fol. 125] Mr. Porter: Mr. Examiner, I don't want to make a mountain out of a molehill, belabor this point, but relating to the colloquy between Mr. Beckley and myself he refers to a statement made by Mr. R. H. Ewalt, whom we called as a witness, being the Applicant, in Finance 19804, who was superintendent of the Land and Timber Department of the Cleveland Cliffs Iron Company. And in cross-examination of the witness by Mr. Beckley he was asked, "Do you have a movement to Amasa, Michigan?" Answer, "Amasa, yes." Question, "Do you expect that to continue?" Answer, "No." That was on the bottom of Page 60 and top of Page 61 of the transcript.

Exam. Bradford: I see no particular point in it at this time.

Mr. Porter: I don't either, but I wanted to keep it clear on it. I don't regard it as being a representation by us.

Exam. Bradford: Do the Applicants have any additional witnesses?

Mr. Merrill: No, sir, no additional evidence. We rest our case.

Exam. Bradford: Are the Protestants ready to proceed?

Mr. Beckley: Yes.

Exam. Bradford: You may call your witness.

Mr. Beckley: I call Mr. Beaudry.

HENRY J. BEAUDRY was sworn and testified as follows:

[fol. 126] Direct examination.

By Mr. Beckley:

Q. Will you please state your name and address?

A. H. J. Beaudry, Main Street, Marquette, Michigan.

Q. What is your occupation, Mr. Beaudry?

A. I am general freight agent in charge of rates, traffic department, DSS&A Railroad.

Q. Could you tell us your experience in the field of traffic?

A. Well, I spent nineteen years in the accounting department, handling practically every job there, with the exception of official. In 1939 I was transferred to the transporta-

tion department at Marquette. Had that job for a few years and then appointed assistant freight agent and then later general freight agent. I started working for the railroad, I shouldn't date myself that way, in 1919.

Q. Are you familiar with the routing of traffic, publication of tariffs, and so forth?

A. I am.

Q. Now, Mr. Beaudry, when the LS&I and Milwaukee established this connection at Republic Junction could they immediately ship goods for shippers all over the country or did something have to take place before they would be able to ship to those?

A. Well, what they had to do was to file routing proposals through the Western Trunk Line Committee for consideration and approval, which they did.

[fol. 127] Q. And were those routing proposals filed simultaneously or did the filing take place over a long period of time?

A. Oh, I would imagine they possibly took a couple of months to file the proposals and rate publications were not all made on the same date.

Q. So that on the day the connection was opened they were not in a position to handle as much traffic as they are now that a lot of new routes have been established?

A. That is correct.

Q. Did you make a study of the volume of traffic which was interchanged between the DSS&A and the Milwaukee at Champion to points that are competitive or to stations on the LS&I?

A. That is right, we did.

Q. What period is covered in your study?

A. We cover the period from November 1, 1956 to December 31, 1957.

Q. What was the reason for selecting that period?

A. Frankly I don't know, but I imagine that was the year previous to the time the interchange between the Milwaukee and the LS&I Railway was established.

(Intervenor's Exhibit No. 8, Witness Beaudry, was marked for identification.)

By Mr. Beckley:

Q. I have handed you a document which has been marked for identification as Exhibit 8. Will you describe what this document sets forth?

[fol. 128] A. This exhibit sets forth the traffic interchanged by the DSS&A with the CM&SP&P Railway at Champion, Michigan for a period, November 1, 1956 to October 31, 1957, originating or terminating at DSS&A, Ishpeming, DSS&A Negaunee, DSS&A, Marquette, and stations on the LS&I Railway.

Q. What is the basis for the figures which are set forth, what is your source?

A. These figures were taken off the passing reports that we have at Champion, Michigan, that are made at Champion, Michigan for this period of time.

Q. In your opinion is this an accurate representation of the traffic handled during this one year to the points indicated?

A. It is; it is.

Q. Do the LS&I and DSS&A have reciprocal switching rights at Ishpeming, Michigan?

A. They do, and practically of this traffic originating or terminating at DSS&A, Ishpeming, Negaunee, or Marquette could be handled under reciprocal shipping by the LS&I Railway by Republic Junction and Milwaukee Railway.

Q. What tariff is so provided?

A. Switching absorption tariffs. The DSS&A tariff is freight tariff 11F-ICC3942. The LS&I switching tariff is GFD-1463-ICC-220.

Q. Are there any limitations on the reciprocal switching rights under those tariffs?

[fol. 129] A. There are a few industries located on the DSS&A, likewise on the LS&I where no reciprocal switching is in effect, but those are in the minority.

Q. In the event that the Milwaukee establishes a route and rates in conjunction with the LS&I covering movements of all of these commodities, is it your opinion that they would be susceptible of diversion from the DSS&A to the LS&I?

A. Yes, they are. And, in fact, all routes today in connection with this particular traffic, or the majority of it, routes are established in connection with the LS&I via Republic Junction and Milwaukee Railway and to their destination via a connection beyond.

Q. Have you checked tariffs to determine whether routings have been established for the principal commodities shown in this Exhibit 87

A. Yes, some of the tariffs. For example, there is a movement of rosin from Milwaukee, Wisconsin, to Munsing. Those rates are published in the Milwaukee tariff 2400S-ICC-B-7710 in Sub 128 and that became effective on October 20, 1957.

Q. Well, could you give us some other examples of tariff publications. For example, I noticed a hundred and three cars of fuel oil originating or terminating at Ishpeming on Sheet 1.

A. The fuel oil originated at Lockport, Illinois; Green Bay, Wisconsin; Milwaukee; Whiting, Indiana; destined to Ishpeming or Marquette. Those rates are all published in [fol. 130] Milwaukee Tariff 12000-L-ICC-B-7817, routing in connection with the Milwaukee railway via Republic Junction, LS&I was established in Sub No. 31 effective October 29, 1957.

Q. Can you give us examples of routings which would make it possible for movements shown in this exhibit to be handled via the LS&I?

A. Yes. We had a considerable volume of cement that moved from Green Bay and Manitowoc, Wisconsin to Ishpeming and Marquette on the DSS&A, also to stations on the LS&I. Those rates are published in WTL Tariff 132-L-ICC-A-4188, and routes via the Milwaukee, Republic Junction, LS&I were established in Sub 14, effective November 27, 1957. And there is another large movement of meat from Omaha, Nebraska, going to Ishpeming. Those rates are published in WTG Tariff 1-B-ICC-A-4038, and routing via the Milwaukee Railway for Republic Junction LS&I was established in Sub 19 effective November 10, 1957. We have quite a movement of tractors from Peoria, Illinois going to Marquette. Those rates are published in WTL Tariff 5-U-ICC-A-3910 and routing was established

via CM&SP&P, Republic Junction, Michigan, LS&I in Sub 149, effective November 10, 1957. Now, there is considerable movement of charcoal which moves from Marquette to various Western Trunk Line destinations. WTL routing guide No. 444-ICC-A-3843, provided for routing via LS&I, via Republic Junction, CM&SP&P, Sub 31, effective November 25, 1957. Now, there is a movement of paper from Munsing, Michigan, to Stoughton, Wisconsin. The rates [fol. 131] were published in WTL Tariff 169-O-ICC-A-4082, routing via LS&I, Republic Junction, CM&SP&P was established in Sub 560, December 12, 1957.

Q. Now, Mr. Beaudry, you have not attempted to establish routes for all of the commodities involved in your exhibit?

A. No, I haven't.

Q. But that is a representative showing of the routes which have been established on some of the more important commodities that were handled to competitive points?

A. That is correct.

Q. Has it been your experience in analyzing the flow of traffic that when additional routes are established there is a tendency for the traffic to be spread out among all other available routes?

A. It has been our experience, and that shippers try and divide traffic on a reasonable basis.

Q. So that by adding this Republic Junction route between the Milwaukee and the LS&I another route is available to shippers?

A. That is correct.

Q. Has it been your experience that freight solicitors for railroads endeavor to secure routings over their line?

A. They better, and we also attempt to secure our long haul route.

Q. And on the basis of your experience in the traffic solicitation field, would you anticipate that the LS&I would [fol. 132] endeavor to get traffic where it has routes?

A. I would say so.

Q. And as a result of that solicitation and the creation of the new routes, do you anticipate that there will be a diversion of traffic from the DSS&A?

A. I think there would be, particularly so from points on the LS&I Railway where the Milwaukee would handle the traffic and we would be intermediate carrier. They would divide that traffic two ways, whereas at the present time or before the connection was established, the only outlet the Milwaukee had was to use the DSS&A Railway as intermediate carrier. And, of course, any freight rates in effect via those routes would have to be divided three ways instead of two ways via Republic Junction route today.

Q. Calling your attention to Pages 2 and 3, showing the traffic originating or terminating at Marquette, does a substantial portion of that traffic originate or terminate on industry on the LS&I where the DSS&A absorbs the switching charges?

A. Yes.

OFFER IN EVIDENCE

Mr. Beckley: I offer in evidence Exhibit 8.

Exam. Bradford: Any objections?

Mr. Merrill: No.

Exam. Bradford: Hearing none, it is received in evidence.

(Intervenor's Exhibit No. 8, Witness Beaudry, was received in evidence.)

[fol. 133] Mr. Beckley: That concludes my examination.

Exam. Bradford: You may cross-examine.

Does the Northwestern have any questions of this witness?

Mr. Dickman: No questions, Mr. Examiner.

Cross examination.

By Mr. Merrill:

Q. Mr. Beaudry, approximately what proportion of this traffic which you show as competitive was competitive before the junction or connection was established between the LS&I and the Milwaukee at Republic Junction so far as your railroad is concerned?

A. Now, let me answer that question by asking you a question. When you say competitive, you don't mean the Milwaukee-Republic trip, you mean competitive by the

Soo Line-Eben Junction, Northwestern-Little Lake. Is that what you mean?

Q. That is right, I believe, but what is competitive between you and the LS&I prior to the connection at Republic Junction?

A. Offhand, without checking each industry on the LS&I and DSS&A and so determine where the traffic is going, I couldn't tell you. I haven't made a check.

Q. Would it be your impression that almost all, if not all of the traffic shown on your Exhibit No. 9 would have been competitive even before the establishment of this connection at Republic Junction?

A. I'd say possibly seventy-five per cent of it would be competitive.

[fol. 134] Q. I believe you stated the traffic is generally divided among the carriers. Service being about the same, is the traffic not divided equally among origin carriers serving industry?

A. Serving direct or reciprocal switching?

Q. Let's take serving it direct.

A. Well, I think most shippers in our territory try to divide the traffic fifty-fifty if it is possible.

Q. Among the origin carriers?

A. Yes.

Q. And with respect to reciprocal switching, do they also try to give the carrier that serves the station part of the business even though they don't directly serve the plant, is that customary?

A. Yes, I believe so.

Q. Was that origin of the paper which moves to Stoughton, Wisconsin, Munsing, Michigan?

A. Munsing, Michigan.

Q. Is that industry on the DSS&A Railroad?

A. Munsing is on the LS&I.

Q. That is a movement which if you participated in it, it would be only as a bridge carrier, is that right?

A. That is right.

Q. Do you know of any advantage that there is to the Milwaukee Railroad to solicit traffic for movement over the LS&I as compared with soliciting the movement over the DSS&A?

[fol. 135] A. Would you be talking now about traffic originating at Negaunee, Ishpeming, Marquette?

Q. The point shown on Exhibit No. 8.

A. With the LS&I, yes, direct.

Q. Do you know of any reason why they should prefer to ship over the LS&I from these competitive points rather than solicit over the DSS&A?

A. No, I don't. The only reason would be if your solicitor wasn't aware of the facts, how the rates were divided, if any divisions were equal insofar as the Milwaukee Railway is concerned, I don't think the Milwaukee Railway would attempt to solicit one way or other, but if the divisions for the Milwaukee Railway were more favorable when the LS&I originated the traffic then they were when the DSS&A originated the traffic, then the Milwaukee Railway would no doubt try and work with the LS&I.

Q. The length of haul which the Milwaukee Road would receive on traffic it interchanges with the DSS&A at Champion, Michigan, would be somewhat longer than it would receive interchanging with the LS&I at Republic Junction, would it not?

A. From what origin point?

Q. From the points to and from which this traffic moves, namely points south of Champion.

A. Well, I just don't know what that distance would be via the LS&I direct. As far as distance is concerned, I think it is negligible and from a division standpoint, the [fol. 136] divisions via Champion and Republic Junction would be about the same.

Q. But in the event they should favor the Milwaukee on interchange with the DSS&A, then you feel they would favor the DSS&A in their solicitation, would you not?

A. I would think so, yes.

Mr. Merrill: That is all.

Exam. Bradford: Any redirect?

Mr. Beckley: No.

Exam. Bradford: The witness is excused.

(Witness excused.)

[fol. 137] Mr. Beckley: Call Mr. Barry.

RICHARD J. BARRY was sworn and testified as follows:

Direct examination.

By Mr. Beckley:

Q. Would you state your full name and address?

A. Richard J. Barry, Main Street, Marquette, Michigan.

Q. What is your position, Mr. Barry?

A. General superintendent of the Duluth, South Shore and Atlantic Railroad.

Q. And what are the scope of your duties in that position?

A. I have charge of the operating department, as well as the divisional accounting section.

(Intervenor's Exhibit No. 9, Witness Barry, was marked for identification.)

By Mr. Beckley:

Q. Did you undertake to make or cause to be made a study of the comparative rates of return of the four railroads involved in this proceeding?

A. Yes, sir.

Q. Is that statement on the document which I have marked for identification as Exhibit No. 9?

A. Yes, sir.

Q. Will you describe the manner of the preparation of the exhibit and the information which it shows?

A. The exhibit is to show a comparison of the rate of return of net operating incomes on average net investment [fol. 138] for transportation purposes, for the years 1953 through 1957. The information as shown for the D. S. S. and A. Railroad, the C. N.W. Railway and the C. M. St. P. and P. Railway was derived from Form A report, which is the I. C. C. annual report and obtained from Schedule 200 A, "Cash and Materials and Supplies," Schedule 211 N, showing the road and equipment property and depreciation, and Schedule 300, showing the net railway operating income. The information shown for the L. S. and I Railway was obtained from Exhibit 9, "Railroads' Reply Verified,

Statement No. W-33, Ex Parte No. N 2, Increased Freight Rates, 1958," which was a statement furnished to us by the Great Northern Railroad.

Q. Do we have copies of the Form A for the L. S. and I. in our files?

A. No, we do not.

This was the reply or verified statement of G. A. Richardson before the Interstate Commerce Commission, Ex Parte No. 212, "Increased Freight Rates, 1958."

Q. Is that information true and correct to the best of your knowledge and belief?

A. It is.

Q. And was this exhibit prepared under your supervision and direction?

A. The exhibit, yes, sir.

OFFERS IN EVIDENCE

Mr. Beckley: We offer in evidence Intervenor's Exhibit No. 9.

[fol. 139] Exam. Bradford: Is there any objection to the receipt of Exhibit 9?

Mr. Porter: I have no objection.

Mr. Nagle: May we reserve an objection? We are checking figures.

Exam. Bradford: I will reserve ruling if you desire to cross-examine.

Off the record.

(Discussion off the record.)

Exam. Bradford: On the record.

Mr. Nagle: We have no objection.

Exam. Bradford: Exhibit No. 9 is received in evidence.

(Intervenor's Exhibit No. 9, Witness Barry, was received in evidence.)

Mr. Beckley: That is all I have.

Exam. Bradford: Mr. Dickman?

Mr. Dickman: No questions.

Exam. Bradford: You may cross-examine.

Mr. Porter: No cross.

Mr. Nagle: No cross here.

Exam. Bradford: The witness is excused.

(Witness excused.)

OFFER IN EVIDENCE AND DISCUSSION THEREON

Mr. Beckley: I have some evidence of a documentary evidence to introduce. I will introduce it myself.

(Intervenor's Exhibit No. 10, Counsel Beckley, was marked for identification.)

[fol. 140] Mr. Beckley: I did not obtain certified copies for everyone, but they are true copies of the certified documents I am offering in evidence.

Exam. Bradford: You should describe them.

Mr. Beckley: I will describe them. Exhibit 10 is a group of copies of documents, and the first page has the certificate of Harold D. McCoy certifying that attached to the first sheet are true copies of the following: The first set of sheets which are identified at the top by the numbers 7, 8, 9, 10, 11, and 12, are photostatic copies of those pages of the return to questionnaire filed by the Lake Superior and Ishpeming Railroad Company, in Finance Docket No. 16129, in connection with the construction of the extension of its line from Duncan to Republic, Michigan. These pages are introduced for the purpose of showing the representations made by the L. S. and I., at the time of the construction of the line as to the probable sources of traffic and also contain statements that no track connections other than with the applicant are proposed, and that is in question and answer 14, and in question and answer 24, that the extension was not a connecting line between existing railroads.

The next document is a copy of the report of the Commission in Finance Docket No. 16129, authorizing the construction of the L. S. and I. extension to Republic, Minnesota, which was decided on September 8, 1948, and it also includes a copy of the certificate of public convenience and [fol. 141] necessity issued in response in accordance with the report of the Commission.

Mr. Porter: Is this all one exhibit?

Mr. Beckley: Yes, it is.

Mr. Nagle: What is the number?

Mr. Beckley: It is Exhibit 10.

Mr. Nagle: Thank you.

Mr. Beckley: The report of the Commission states on Sheet 2—

Exam. Bradford (interrupting): You don't have to state what it says.

Mr. Beckley: The third document consists of Exhibit H, which was attached to return to questionnaire filed by the L. S. and I. Railroad in connection with the construction of its east branch from Cusino to Sunrise Landing in Finance Docket No. 19804. This exhibit shows the projected traffic off the east branch.

The next document consists of an extract of the transcript of the hearings conducted in Washington, D. C. on February 7, and 8, 1956, in the matter of the application of Lake Superior and Ishpeming Railroad Company, Finance Docket No. 19804. This extract consists of pages 59 through 61, including a portion of the interrogation of applicant's witness R. H. Ewalt, superintendent of the Land and Timber Department of the Cleveland-Cliff Iron Company, upon cross-examination by Thomas M. Beckley, attorney for Intervenor, D. S. S. and A., this shows the representation made by the shipper witness as to the move-
[fol. 142] ment of traffic of the proposed extension.

The next document is page 114 of the transcript of the hearings conducted on the same date in the same matter. This page contains a portion of the interrogation of applicant's witness, L. C. Smith, traffic manager of Lake Superior and Ishpeming Railway Company, upon direct examination of Philip H. Porter, attorney for applicant, and describes the significance of Exhibit H to the questionnaire which we have previously included among these documents.

The next document consists of an extract of the transcript of the same hearing, pages 118 through 122, including a portion of the interrogation of applicant's witness L. C. Smith, traffic manager of the L. S. and I., upon cross-examination by Thomas M. Beckley, attorney for the intervenor, D. S. S. and A. This transcript includes the

routings and destinations which were proposed by the applicant off this line, and the projection of rates made at that time based for the rates used in the application.

The next document which is numbered at the top 18, 19 and 20, consists of an extract from a brief filed by Philip H. Porter, and I think B. H. Davidson, attorneys for Lake Superior and Ishpeming Railroad Company, filed under the date of August 11, 1956. The brief was a portion of applicant's reply to exceptions of intervenor, Duluth, South Shore and Atlantic Railroad Company. Those exceptions [fol. 143] were to the examiner's proposed report. The extract shows the routings and points out the intention of the applicant to route to the destinations we are talking about today by the Northwestern.

The next document consists of Sheet 6 of the report and order of Division IV of the Interstate Commerce Commission in Finance Docket No. 19804, and sets forth the considerations which the Commission determined material in its decision of that case authorizing the extension.

The last document, which I am offering as a part of this certificate, consists of an extract of pages 2, 3, and 4, of the brief filed by Philip H. Porter and B. H. Davidson, attorneys for L. S. and I., in the same Finance Docket. This document was filed on January 28, 1957, and is a part of applicant's reply to intervenor's, which in that case was the D. S. S. and A., petition for reconsideration.

I offer in evidence Exhibit 10.

Mr. Porter: Mr. Examiner, I object to the receipt of this exhibit principally on the grounds that it is inaccurate, immaterial and irrelevant. And more specifically and particularly in connection with the various parts which are, of which it is comprised, I call the Examiner's attention to the rule of introducing records of the Commission by reproduction in exhibit form and making them subject to objection on any, for any appropriate ground.

Number 1: The first part of this exhibit—and by the way, [fol. 144] I must say for the record, although I am sure that the Examiner appreciates that, it is hardly a fair position for me to be put in to be confronted with portions of documents, portions of evidence without an opportunity to review the full document, the context and any explanatory

part to which it may be related, but here we have taken out of the return to the questionnaire the questions and answers supplied and the docket by which the extension of the L. S. and I. several years ago—in fact, exactly ten years ago—was authorized by the Commission. Now, I haven't seen the remainder of this questionnaire, but I am familiar with questionnaires and finance docket in most of its cases, and I know that very frequently the answers to certain questions will be explained not only by the later evidence to be put in, that is put in at the hearing, but frequently also by answers to other questions, and without having the full document before me, I don't know whether this can be reasonably inferred to be considered without the context.

Furthermore, I say, what materiality can this have, a case presented ten years ago by this applicant involving an extension of their lines to Republic which has been for ten years a part and parcel of the line of railroad; or what consideration may have been given at that time under conditions which are now so stale. Of course, we don't object to the receipt of the report of the Commission and the copy of the certificate issued, that is something which the Commission will take official notice, anyhow. [fol. 145] Now, the same sort of objection we have here in the next part, a piece of paper that has on the top of it number 59, and last page 61, which is a piece of the testimony taken from witness Ewalt's on cross-examination. The portions to which Counsel refers are determined material and pertinent to this inquiry will be found on examination, as I pointed out a few minutes ago, to be merely expressions of expectation on the part of manager of timberlands of the shipper of these forest products. Now, what difference could there be in determining the public convenience or the public interest of the proposed connection here or the proposed operation here that this gentleman did not expect that the logs would continue to move to Amasa? Note that he says in answer to a question "What is the ultimate destination of those shipments?", that is shipments interchanged. The answer was, "Well, the only way I can answer that question is to state where the logs we are shipping at the present time beyond Ish-

pening are going". I object to that on the ground of relevancy, materiality, and on the grounds that it is merely taken piecemeal from the testimony without reasonable opportunity for me to supply any other testimony bearing upon the context from the same record.

Now, I was in the case in 19804, and I remember too that we revised in the course of the hearing several of these exhibits which were attached to the questionnaire. I as-
[fol. 146] sume, but I don't recall whether this Exhibit H. was revised and I assume it was not, in view of the fact that Mr. Smith apparently did testify page 114, that it was taken from a forecast given to him by the Cleveland-Cliff Iron Company and the allocation of revenue made in accordance with the Commission's requests in that questionnaire. On the same ground I object to the next part of the exhibit, which is pages—comprised of pages 118 to 122 of a transcript in that case. I have forgotten the name of the witness. Again, Mr. Smith's testimony which he was presenting a forecast, would have any use, or consent, or be willing to be bound two years from now by any forecast we may make on the basis of conditions prevailing today.

I don't believe that this is factual today and for that reason and it being only a portion of his testimony I object to it on that ground also. Not being testimony as to facts, mark you, Mr. Examiner, but testimony as to what he thought at that time, not even that. Not even what he thought, but what somebody else thought and gave to him, and he reduced to a dollar and cents figure.

Now we come to that portion for which I am responsible, excerpts taken from my brief filed in the same case. Now, what bearing has that got on the public convenience and necessity of the public interests of this connection. The argument that I saw fit to make in another case, has argument become evidence? I see no inconsistency in our posi-
[fol. 147] tion there and our position here, but if we are going to bring into this record one portion of my brief, let's bring in the whole document. But even so, I don't believe that a lawyer's argument whether oral or on brief is helpful to an examiner or helpful to a commission in determining the facts in the application of those facts to the law and to the public interest in a pending case. Now, the

next portion is, seems to me to be even worse. I don't suppose I should object to Sheet 6 of the report. I take it that this was not the Examiner's recommended report but the report of the Division.

Mr. Beckley: Yes, it was, it is the final report.

Mr. Porter: The final report in Finance Docket 19804. Now, it isn't necessary to bring that into the record. The Commission takes official notice of its own reports. As the Examiner knows, we sit and we quote them in our briefs, and we have full use of presenting them for the purpose of argument to the Commission and so I must object to that.

Again, the next part is again a part of my brief as I hastily cast my eyes over it. I don't see anything to be particularly ashamed of. In no modesty, I don't expect it was too good, but it convinced the Commission, I believe, that our position in the case was sound and just. Why the Examiner should be burdened by what we had to say in a different case seems to me to be rather pointless. And for those reasons, Mr. Examiner, I object to the receipt of this proffered exhibit.

[fol. 148] Exam. Bradford: Mr. Beckley, what is the purpose of this exhibit, I might ask?

Mr. Beckley: Well, Mr. Porter has talked at great length as to each individual item comprising the exhibit and perhaps I should address myself to each item in the same order so you can see the relevancy to this proceeding.

First of all, Mr. Porter claims great surprise that we should extract a portion of the questionnaire. He says he didn't have any idea that they were going to put in evidence like that. I recall his attention to the fact that in our original petition to the Commission where we filed a complaint concerning the unauthorized extension of the line of railroad of the L. S. and I. to a connection with the Milwaukee. In Section 4 thereof, we call to the attention of the Commission the fact that the L. S. and I. represented in its return to questionnaire in Finance Docket No. 16129, that it would not make any physical connection from the proposed extension with any other railroad.

Exam. Bradford: Is that the purpose of the—

Mr. Beckley (interrupting): That portion of the exhibit?

Exam. Bradford: Yes, that is what I mean, the return to the questionnaire filed in 1949.

Mr. Beckley: That is right.

Exam. Bradford (continuing): Is to show that at that time they made the statement that they did not propose to connect with any other railroad?

[fol. 149] Mr. Beckley: Yes.

Well, now, let's just look at it.

Exam. Bradford: O.K., I don't want you to argue about it, I just want to know if that is the purpose of it, and to show the nature of the traffic to be handled on that line.

Let the record show that that portion of the record is rejected.

Now, you may proceed.

Mr. Beckley: Perhaps I should make a little argument on that point then.

Exam. Bradford: You can argue it on brief, if you desire.

Mr. Beckley: Well, I think railroads have a right to rely on representation in returns to questionnaires in positions they are going to take in proposed extensions.

Exam. Bradford: I suppose so, in that particular proceeding concerned.

Mr. Beckley: This is the same track, and they constructed an extension without any authority. They didn't make any application for authority to construct the extension.

Exam. Bradford: It is a different proceeding and I can't see any relation at all between the convenience and necessity today and the statement in that return to the questionnaire in 1949. There may be, but I can't see it.

Mr. Beckley: I don't think that the railroad should be bound by those representations that they can construct an [fol. 150] extension representing all other railroads, with no connection, and without filing authority to proceed to construct extensions. If there would be indication that there would be a connection, we would have intervened in the case to protect interests.

Exam. Bradford: We have a proceeding here, assuming they are seeking authority.

Mr. Beckley: We have a complaint filed by the D. S. S. and A. in Finance Docket 20048, complaining of the construction of authorized extension, and I think that has definite bearing as to whether that connecting line is a switching track or not. This is actually two proceedings.

Exam. Bradford: I still reject that portion of the exhibit.

Mr. Beckley: The next is a report and order and certificate of the Commission which shows the authority by which they built this line that they are extending off of. That contains a statement that there would be no connecting line from this statement, Page 2, end of first paragraph.

Exam. Bradford: Well, of course, that is related to the prior portion and I see no particular relevancy to it in this proceeding, so I will sustain the objection to that.

Mr. Beckley: There was no objection to that, he consented to it as I remember.

Exam. Bradford: You can refer to it. We can all refer to it.

Mr. Beckley: The next item is Exhibit H, to questionnaire in L. S. and I. in Finance Docket 19804. The evidence in this [fol. 151] hearing has shown that the connecting track with the Milwaukee was constructed and placed in operation at about the same time as the east branch extension. The evidence presented today further shows that the purpose of this connection with the Milwaukee is to, for the most part, handle traffic off the extension authorized in Finance Docket No. 19804. We think that the L. S. and I. might very properly have, if they intended to make this connection with the Milwaukee, so indicated in their application and in Finance Docket No. 19804, and that they are representations as to the public convenience and necessity. The movement of traffic in that docket is of relevancy in this proceeding since we are talking about the very same traffic. Now, Mr. Porter suggested that in our brief exchange earlier, I think this afternoon, that if he had indicated that he was going to build in on the, or if he was going to connect to the Milwaukee, he would have expected a lot more opposition in that case than he got.

Mr. Porter: I didn't say any such thing or intended to imply it. I said if we had shown a connection with the

Milwaukee, you would have screamed to high heaven that we had no connection.

Mr. Beckley: Certainly we would have.

Mr. Porter: And we were presenting our case on the basis of facts as they are existing.

Exam. Bradford: What is the purpose of Exhibit H?

Mr. Beckley: Exhibit H shows projected movement of [fol. 152] the east branch. It shows that all of the interchange of the chemical wood and saw logs destined for Iron Mountain was to be at Little Lake, Michigan, for beyond, and that interchange would be only with the North Western. There was no representation that there would be any interchange with the Milwaukee. We are talking about the same traffic, the tracks were constructed and placed in operation at the same time.

Exam. Bradford: I can't see the relevancy in a proceeding where the question, the sole issue, is the public convenience and necessity for the construction, something that—

Mr. Beckley (interrupting): I think in testing the public convenience and necessity the railroad ought to be bound by representation in one case if talking about the same traffic in another case. It goes to the weight of the testimony which has been adduced today.

Exam. Bradford: Well, they don't state on this Exhibit H that they wouldn't build this connection.

Mr. Beckley: They don't, but they indicate what the proposed routings will be.

Exam. Bradford: Well, these routings are available, aren't they?

Mr. Beckley: They are available, but here today we find that another track is necessary because this routing which they proposed in the first place is not adequate.

Exam. Bradford: That is the one we are considering in [fol. 153] this proceeding, not this one. We are considering the one they are proposing now.

Mr. Beckley: I think we also have this other docket number which the Examiner may or may not be aware of.

Exam. Bradford: I will sustain the objection to Exhibit H.

Mr. Beckley: The next three are excerpts of the transcript of the hearing at Washington in connection with the east branch extension.

Now, Mr. Porter sits there with a copy of the transcript in his hand.

Mr. Porter: Yes, and I suppose I have read it all in the last five minutes.

Mr. Beckley: We would be willing to permit him to offer in evidence any extracts they have which would tend to rebut the statements made in these excerpts.

Exam. Bradford: Well, let's go off the record.

(Discussion off the record.)

Exam. Bradford: On the record.

I will sustain the objections to pages 59 to 61.

Mr. Beckley: Page 114 consists of a description of Mr. Smith of the shipments described in Schedule H attached to the questionnaire.

Exam. Bradford: Let's go off the record.

(Discussion off the record.)

Exam. Bradford: On the record.

[fol. 154] Since Exhibit H is out that would have to go out too.

Mr. Beckley: Pages 118 through 122 consists of testimony of Witness Smith showing the projected divisions, and the routings on the traffic from the proposed extension covering the very same saw logs and the very same chemical wood that we are talking about in the case today.

Exam. Bradford: When it moves over the D. S. S. and A.?

Mr. Beckley: No, when it moves over the L. S. and I. They are projected divisions.

Mr. Porter: Soo Line.

Exam. Bradford: I will sustain the objection to that.

Mr. Beckley: All right.

Next, consisting of pages 18 through 20 of Mr. Porter's brief to the reply to exceptions to the proposed report. In this case, in the case of the east branch extension, the D. S. S. and A. relied heavily on a case known as "Construction of Line by Jefferson and South Western, 86 I.C.C.

796. The holding in that case was that in the case of an industry dominated railroad the Commission would not authorize an extension since the shipper might be able to play one connection against another and secure unusual benefits from one railroad as against another because it was in a position to control traffic.

On pages 19 and 20, the brief outlines the description of the traffic originating from the branch and contains a statement in the middle of page 19, "Here the involved traffic is [fol. 155] all outbound and in no material degree subject to the competition of connecting lines for its routing". Now, we questioned Witness Kline today and he tells us that that is still the position of the L. S. and I., or that that is an adequate representation of the position of the L. S. and I. as to the movement of saw logs and chemical wood off this extension. The same movement we are talking about today. Now, this was a representation made to win this case. Here we are faced with the exact opposite situation where the applicant is seeking to establish an alternate routing and thereby creating that situation which he argued did not exist and which was the basis for—as you will note—for a portion of the Commission's decision.

Exam. Bradford: Is it my understanding that you are raising that point now in this proceeding?

Mr. Beckley: Yes, I am.

Exam. Bradford: Well, I think you should do it directly rather than this indirect method. It would be very hard for me to even understand it from just this portion of the argument.

Mr. Beckley: That is why the other documents were offered, because the other documents show the basis for this argument which was made, and on which the Commission relied. That is the reason for introducing Exhibit H and extracts from the testimony. I think it is material in this case.

Mr. Porter: Mr. Examiner, Counsel is free to argue the law in this case as he wants and if he has as he says [fol. 156] "competitive traffic" and that Cleveland Cliffs is going to play one connecting line against the other, he can argue that. I am perfectly satisfied that the Jefferson

South Western Case is still the law and I will rely on it for this case if that point is raised against me. It is an argument on the law and I just can't see why it should be put into the record which is supposed to be a record of facts.

Mr. Beckley: It strikes me that all of this that I have offered rebuts the evidence which the applicants have put in intending to show public convenience and necessity for this connection because they relied on another situation when they got the authority.

Exam. Bradford: Well, they haven't the authority here.

Mr. Beckley: When they got the authority to construct the east branch.

Exam. Bradford: That is a separate proceeding.

Mr. Beckley: But it involves the same traffic, constructed at the same time.

Exam. Bradford: Over another portion of the line, certainly doesn't involve the traffic over this connection.

Mr. Beckley: It describes the manner they intended to route the traffic they propose to route over this connection.

Exam. Bradford: Yes.

Mr. Beckley: How can I get that in evidence in this case? That was their intention, they expressed it to the Commis- [fol. 157] sion. They put it in the record and made a case of it and made an important point of law on the basis of those representations.

Mr. Porter: It was not really an expression of intention, it was an expression of expectation and it was honest expectation at that time. It seems to me that the east branch is a closed issue now and that in view of later developments whether or not we should be able to handle the traffic over Republic Junction is the issue now before the Commission regardless of what the Commission considered under 19084.

Exam. Bradford: That is the way I interpret it. The question here is whether or not the traffic should move via Republic Junction. Not what they said it was going to be at the time that they made previous application.

Mr. Beckley: Let's put it this way: This case involves the same traffic, they have put on evidence showing the

need for this connection at this hearing. Now, in a prior hearing they introduced evidence involving the same traffic which was in direct conflict with the testimony they are introducing today. Now, certainly this is rebuttal evidence, to rebut the testimony they are offering today. We are talking about the same movement. Connections, and extensions were built at the same time and placed in operation at the same time. I don't believe that trucking cases, for example, that the Commission gives credence to the unauthorized movement that had taken place where the carrier has been operating without authority as a basis for public [fol. 158] convenience and necessity, and yet that is the only evidence which has been shown in this proceeding. Now, here are the representations which they made when they originally constructed the track to serve this area, the same area covered by this application, a large part of it.

Mr. Porter: Mr. Examiner, those representations have no bearing upon whether or not this was authorized or unauthorized operations.

Exam. Bradford: Well, I think in order to bring it to a head, I will reject the Exhibit 10, and you, of course, I presume will except to that ruling?

Mr. Beckley: Yes.

Exam. Bradford: And you may renew it before the Commission. Exhibit 10 will accompany the record and you may renew your objection if you think that it—I mean your offer is good.

Mr. Beckley: May I have an expression of your grounds?

Exam. Bradford: It is immaterial, it is immaterial to the issues in this proceeding.

Mr. Beckley: In either docket?

Exam. Bradford: That is right.

Mr. Beckley: Oh.

Exam. Bradford: Is that your evidence, Mr. Beckley?

Mr. Beckley: That concludes my case, yes.

Exam. Bradford: Mr. Dickman, do you have any evidence?

Mr. Dickman: Yes, we have one witness.

[fol. 159] Mr. MacCarthy.

R. J. MacCarthy was sworn and testified as follows:

Direct examination.

By Mr. Dickman:

Q. Would you state your name, please?
A. R. J. MacCarthy, M-a-c-C-a-r-t-h-y.
Q. By whom are you employed?
A. Chicago North Western Railroad Company.
Q. In what capacity?
A. In the position of general freight and passenger agent at Green Bay, Wisconsin.
Q. What is your address, Mr. MacCarthy?
A. My address is 300 Dousman Street, Green Bay.

Mr. Dickman: I'd like to have this map entitled "The Chicago North Western Railway Company and its connections with other carriers in Michigan, Wisconsin, and Northern Illinois" marked as Exhibit No. 11 for identification.

(Intervenor's Exhibit No. 11, Witness MacCarthy, was marked for identification.)

By Mr. Dickman:

Q. Now, Mr. MacCarthy, referring to Exhibit No. 11, would you briefly describe what that purports to portray?
A. Exhibit 11 shows the lines of all of the carriers serving the upper peninsula of Michigan and Wisconsin. It shows in black lines the line of the Chicago North Western Railway Company; red lines the Chicago, Milwaukee, St. [fol. 160] Paul and Pacific. In green lines, the Duluth, South Shore and Atlantic Railway and in purple lines, the Lake Superior and Ishpeming Railway.
Q. As a matter of fact, isn't the color code to the map at the bottom of the map which shows all the railroads?
A. Yes. That shows the others I did not mention for the reason they are not involved in this proceeding.
Q. And what is the meaning of the cities which are circled with black ink on the Exhibit 11?

A. Those cities are points of connection with other railroads. They are competitive points, many of them are common points with the Milwaukee Road.

Q. And is this map showing the general locations of various lines in the Upper Peninsula accurate in your opinion?

A. Yes.

Q. Reasonably accurate.

OFFER IN EVIDENCE

Mr. Dickman: I would like to offer Exhibit No. 11 into evidence.

Exam. Bradford: Is there any objections?

Mr. Merrill: No objections here.

Exam. Bradford: It is received in evidence.

(Intervenor's Exhibit No. 11, Witness MacCarthy, was received in evidence.)

By Mr. Dickman:

Q. Mr. MacCarthy, did you prepare a prepared statement in this matter?

A. I did.

[fol. 161] Q. I wonder if you would read it.

A. "My name is R. J. MacCarthy. I am a resident of Green Bay, Wisconsin, and am employed by the Chicago and North Western Railway Company in the position of General Freight and Passenger Agent at Green Bay, Wisconsin.

I appear in opposition to the establishment of a connection and point of interchange between the Lake Superior and Ishpeming Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company at Republic Junction, Michigan.

I have been employed in the Traffic Department of the Chicago and North Western System in various capacities since April 5, 1928. In my present assignment I am in charge of traffic sales supervision over the entire upper peninsula of Michigan, and a large part of the State of Wisconsin. I have first-hand knowledge of the importance

to the Chicago and North Western System of the traffic which flows over our rails in the Upper Peninsula of Michigan, and particularly that portion of the Upper Peninsula of Michigan which is served by the Lake Superior and Ishpeming Railway Company. I have also become fully aware of the part the Chicago and North Western System has played in the development of the Upper Peninsula of Michigan, and the part it continues to play in the progress and growth of that area. I am familiar with all phases of traffic work.

The lines of the Chicago and North Western are shown in black on Exhibit 11 "—and I would like to mention the [fol. 162] fact that that is the black shown there, if you will fill in the number.

"The lines of the Chicago and North Western are shown in black on Exhibit 11. The Chicago and North Western lines in Michigan are of very light traffic density.

The Chicago and North Western Railway Company maintains and operates a total of 398.5 miles of main line trackage in the Upper Peninsula of Michigan, and 65 miles of branch line trackage, and presently maintains connection and points of interchange with the Lake Superior and Ishpeming Railway Company at three points: Ishpeming, Little Lake and Negaunee in upper Michigan.

The Chicago and North Western also maintains connections and points of interchange with the Soo Line Railway Company at Hermansville, Ironwood and Larch, Michigan, with the Duluth, South Shore and Atlantic Railway Company at Ishpeming and Negaunee, Michigan, with the Escanaba and Lake Superior Railway Company at Escanaba, Michigan, and with the Chicago, Milwaukee, St. Paul and Pacific Railway at Crystal Falls, Iron Mountain, Iron River and Menominee, Michigan; all in the Upper Peninsula of Michigan. There are presently sufficient mileage and rail connections to adequately provide transportation requirements of the Upper Peninsula of Michigan. It is evident from Exhibit 11 that the Chicago and North Western is able through its own lines and various connections to handle freight expeditiously in Northern Michigan and also between Northern Michigan points and all other [fol. 163] parts of the country.

The Chicago and North Western and the Milwaukee Road lines are parallel in many areas and are directly competitive in many cities."

Mr. Porter: Mr. Examiner, for my part, I would consent, in order to save time that this statement be copied into the record as though it were read unless the witness would rather read it, I have no objection to reading it.

Mr. Dickman: It is all right with me, just so it is copied into the record as read.

Exam. Bradford: Is there any objection to that procedure?

(No response.)

Exam. Bradford: If not, we will concede that you have read your statement, Mr. Witness.

A. "The Chicago and North Western operates regularly scheduled time freights to and from its points of connection with the Lake Superior and Ishpeming Railway Company daily, seven days each week. These time freights connect with other regularly scheduled time freights, providing fast, dependable freight train service to all points of the Chicago and North Western System to points of interchange with other Upper Peninsula carriers mentioned above, and also to such important interchange points as Marinette, Wisconsin; Green Bay, Wisconsin; Manitowoc, Wisconsin; Milwaukee, Wisconsin; Chicago, Illinois; St. Louis, Missouri; Des Moines, Iowa; Omaha, Nebraska; [fol. 164] Sioux City, Iowa; St. Paul, Minneapolis and Minnesota Transfer, Minnesota; Duluth, Minnesota; and Superior, Wisconsin, at which points connections are made with all of the rail lines in this section of the United States.

The section of the Upper Peninsula of Michigan served by the Lake Superior and Ishpeming Railway Company has, by virtue of the connections maintained between the Lake Superior and Ishpeming Railway Company and the Chicago and North Western Railway Company and other Upper Peninsula carriers, adequate and efficient rail service to and from all sections of the United States and Canada, and there is no necessity for additional rail connections or service.

In addition to regularly scheduled time freights operating between Ishpeming and Escanaba during the year 1957, the Chicago and North Western Railway Company operated a total of 27 extra trains especially for the movement of iron ore to its Escanaba iron ore docks.

The Chicago and North Western Railway Company operates two passenger trains in each direction daily between Chicago, Illinois, and Ishpeming, Michigan, a daylight streamlined train, and a night train providing Pullman, mail and express service.

The Chicago and North Western Railway completed its first rail line in the Upper Peninsula of Michigan in 1864 and is the pioneer railroad of the Upper Peninsula. For almost 100 years it has served as a common carrier in the [fol. 165] Upper Peninsula, often at a loss. The Chicago and North Western has spent millions of dollars in developing its own facilities in the Upper Peninsula. It was the Chicago and North Western which provided the first rail outlet for the forest products of the area. The Chicago and North Western was one of the first to recognize the value of trees as a cash crop for farmers and in 1949 began making available the first mechanical tree planting machine in the Upper Peninsula. We have planted about one million tree seedlings on Upper Michigan soils not suitable for agricultural purposes.

The Extension Division of Michigan State College has credited our tree planters with doing more to stimulate tree planting in Upper Michigan than any other industry or agency. They have further credited our progress with being instrumental in encouraging others to buy mechanical tree planting machines and make them available on a similar basis to that which we initiated. This early interest in mechanical tree planting has broadened the interest of land owners to other activities in woodland management.

During the year 1957 our Agricultural and Resource Development Department in cooperation with the Michigan Extension Service, and working with the County Agents of the Upper Peninsula, aided in the planting of experimental plots of five varieties of soy beans, two of which have proven practical for this area. Experimental plots have again been planted in 1958, and there is some

[fol. 166] indication that through our efforts, a new agricultural industry will have been introduced to the Upper Peninsula thereby aiding its development for the future.

The Chicago and North Western Railway owns and operates a fleet of 4,069 gondola cars, used very largely for the improvement of pulpwood and timber products on its System, including the Upper Peninsula of Michigan. During the year 1957 a total of 2,003 of these cars were completely renovated and up-graded at the Chicago and North Western Railway Company's Clinton, Iowa, car shops in order to place our company in a better position to serve the timber industry in the Lake states. During the off-season between the 1957 and 1958 shipping seasons, the Chicago and North Western Railway Company repaired and fully up-graded a total of 806 ore cars to better serve the mining industry during 1958, and during the future. It owns 3,525 such cars.

The Chicago and North Western Railway Company owns and operates a fleet of 19,712 box cars of all types to serve shippers of agricultural and manufactured products located on its lines, and on connecting lines. A cleaning track is maintained at North Green Bay, Wisconsin, capable of washing and thoroughly cleaning up to 150 box cars per day, many of which are sent to the Upper Peninsula of Michigan for loading with various products.

The section of the Upper Peninsula of Michigan which [fol. 167] is served by the Lake Superior and Ishpeming Railway Company is a lightly populated area, and the flow of traffic into and out of the territory is by no means of such volume as to require additional service, now, or for the foreseeable future. In fact, the flow of traffic prior to the establishment of the connection at Republic Junction, Michigan, which is now contested, has been in such light volume as to make the operation of the Chicago and North Western Railway from Escanaba north no more than marginal from a revenue standpoint.

The financial history of the Chicago and North Western is such that any diversion of traffic from the North Western is a serious matter. For the first seven months of 1958 our net loss was $1,592,415. In 1957 we had a net loss of $415,524 and in 1956 the net loss was $5,529,297. We also

had a net loss of over $5,000,000 in 1954. No dividends to common stock have been paid since 1950 and we have had difficulty in meeting payments to bondholders. Working capital has declined greatly all during the last ten years.

Many of the commodities interchanged between the Chicago and North Western Railway Company and the Lake Superior and Ishpeming Railway Company, such as hay and straw, charcoal, sand and gravel, sawdust, fuelwood, logs, lumber, posts, pulpwood, and chemical wood are low-rated commodities. Revenue return on these commodities is directly dependent upon the volume movement, and the Chicago and North Western is dependent upon the volume of [fol. 168] these commodities to provide revenue with which to provide the service and facilities offered to the industries and people of the Upper Peninsula as outlined above.

Prior to the establishment of a point of interchange at Republic Junction, Michigan, between the Lake Superior and Ishpeming Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railway Company, all traffic moving to or from points located on the Lake Superior and Ishpeming Railway Company had to move in or out of the territory to interchange with the Chicago and North Western Railway, the Soo Line Railway, the Milwaukee and Lake Superior Railway Company, or the Duluth, South Shore and Atlantic Railway Company. The establishment of an additional connection and point of interchange between the Lake Superior and Ishpeming and the Chicago, Milwaukee, St. Paul and Pacific Railway at Republic Junction, Michigan, in order to be feasible and profitable to the carriers involved, has and will divert valuable and much needed traffic from the Chicago and North Western Railway.

The diversion of revenue producing traffic from the Chicago and North Western and the other carriers involved will weaken our financial position and lessen our ability to furnish adequate transportation facilities in the Upper Peninsula."

Mr. Dickman: I do have a few additional questions, Mr. Examiner.

By Mr. Dickman:

Q. Mr. MacCarthy, during the year 1957, how much [fol. 169] traffic did the C. and N. W. handle in connection with the L. S. and I. through the interchange at Little Lake?

A. During the year 1957, we delivered to the L. S. and I. at Little Lake 948 loaded cars. During the—excuse me, I am on the wrong statement, I am sorry.

During the year 1957, at Little Lake, Michigan, the Chicago and North Western Railway received from the L. S. and I. 3,869 loaded cars. The Chicago and North Western delivered to the L. S. and I. 2,182 loaded cars. At Ishpeming, the Chicago and North Western Railway received from the L. S. and I. four loaded cars; the Chicago and North Western Railway Company delivered to the L. S. and I. 24 loaded cars. In connection with these figures all dock ore tonnage, all ore moving to the Escanaba dock has been deleted. All rail ore movements are included. Dock ore is not, for obvious reasons.

Q. Now, Mr. MacCarthy, how much traffic of this nature did we handle in the first five months of 1958?

A. During the first five months of 1958 we delivered to the L. S. and I. 505 cars, we received from the L. S. and I., 1,246 cars.

Mr. Porter: Would you repeat those figures, please?

The Witness: We delivered to the L. S. and I. 505; we received from the L. S. and I., 1,246.

By Mr. Dickman:

Q. How did those figures compare with the first five months in 1957?

[fol. 170] A. During the same period of 1957, the first five months, we delivered to the L. S. and I. a total of 948 cars or 443 more than during the five months of '58. Also during the five months of 1957, we received from the L. S. and I. a total of 1,702 cars, again 456 more than were handled during the five-month period of 1958.

Q. Now, Mr. MacCarthy, prior to the Republic interchange or if the Republic interchange had not been affected,

what route would the logs and chemical woods originating on the L. S. and I. destined for Iron Mountain move?

A. They would have moved by the Chicago North Western. L. S. and I. to Little Lake, C. and N.W. beyond.

Q. I see. You would have all that traffic?

A. Yes, sir.

Q. Now, to the best of your knowledge, how much of that traffic are we getting at the present time?

A. To the best of my knowledge, we are receiving less than half of the total originating on the L. S. and I., and moving to Iron Mountain at the present time.

Q. Do you have any estimate of the dollars and cents figures that that 50 per cent figure might represent?

A. Yes, I do. I quote from a letter prepared by Mr. H. A. Gunderson, our assistant vice president, rates in connection with proposed rates on chemical wood from the new line of the L. S. and I. to Iron Mountain. In the first place we [fol. 171] absorbed switching at Iron Mountain of $9.30 per car on sawlogs and chemical wood. We also pay the Milwaukee Road a per diem reclaim of $8.94 per car which reduces our revenue by a total of $18.24 per car, our earnings on the basis minimum weight, 70,000 pounds on chemical wood and 90,000 pounds on sawlogs. Our earnings are $35 per car and $51.30 per car respectively.

Q. That is before you deduct the—

A. (Interrupting) That is our gross earnings from which we deduct $18.24, which is per diem, of course, in that destination.

Mr. Porter: May I interrupt and ask for clarification? Was that $35 on chemical wood and—

The Witness (interrupting): Fifty-one dollars and thirty cents on sawlogs.

Mr. Porter: Out of that you—

The Witness (interrupting): We absorb eighteen dollars and twenty-four cents, which leaves an absorption, $13.26 per car on chemical wood and $24.96 per car on sawlogs, for our haul of 92 miles, Little Lake to Iron Mountain.

By Mr. Dickman:

Q. Now, that's our share on each car that moves from Sunrise to Iron Mountain?

A. That is our share based upon minimum weights.

Q. Based on minimum weights?

A. Minimum weights, yes.

Q. Mr. MacCarthy, are you familiar with the North Western service from Little Lake to Iron Mountain?

[fol. 172] A. Yes, sir.

Q. Could you describe how these logs and chemical wood would be handled after delivery to us by the L. S. and I., to Iron Mountain?

A. They are picked up at Little Lake by Train 34 operating on a daily schedule, leaving Little Lake at 4:00 p.m., standard time, arriving at Escanaba 5:45 p.m., standard time. From Escanaba they are handled to Powers on a switch extra which leaves Escanaba at an early hour, arriving at Powers for connection with Train No. 37, which handles the cars from Powers to Iron Mountain, arriving at Iron Mountain at 4:10 a.m., or thereabouts. The cars are then turned over to—I should have said, excuse me, I should have said arriving Antwin at 4:10 a.m. The cars are then turned over to the Chicago, Milwaukee, St. Paul and Pacific interchange from which point they are taken to Kingsford by the Milwaukee Road.

Q. Approximately how long would that take, did you say?

A. From 4:00 p.m. one night until the following morning at 6:00 a.m.

Q. You mean second morning or the first?

A. Have p.m.,—well, let's work it this way, 4:00 p.m., Monday at Little Lake, they are out of Powers on Tuesday morning and into Antwine on Tuesday morning which gives second morning scheduled service from the Sunrise Landing.

May I correct that, it is the second morning from Little [fol. 173] Lake. It would arrive Wednesday morning, yes.

Q. How far is it from Little Lake to Iron Mountain?

A. From Little Lake to Iron Mountain is—from Little Lake to Escanaba we have a distance of—I have this figured out somewhere else, excuse me—

Mr. Porter (interrupting): Didn't you just say 92 miles?

The Witness: Ninety-two miles roughly, I could break it down.

By Mr. Dickman:

Q. Ninety-two miles, is that correct?

A. Correct. I had that here somewhere. I am sorry, I can't put my finger on it at the moment.

From Little Lake to Iron Mountain is 92.1 miles.

Mr. Dickman: You may cross-examine.

Exam. Bradford: Let's proceed, gentlemen.

Mr. Dickman: You may cross-examine.

Cross examination.

By Mr. Porter:

Q. Mr. MacCarthy, the times that you were reading were just simply timetable times, is that correct?

A. That is correct.

Q. Do you know how often those schedules are actually met by the railroad?

A. The arrival at Iron Mountain has been met with the exception of very few times, probably three to five times this summer. We had one derailment which caused a late arrival at Iron Mountain, Train No. 37. We had some tonnage problems on one or two occasions where we were [fol. 174] handling a number of gondolas for ore loading. Aside from that I am not aware of any late arrivals at Iron Mountain.

Q. Now, you have had to leave cars at Powers at sometime?

A. There were one or two times in which I am aware of and this is on the basis of conversations with our operating supervisor and trainmaster.

Q. And as I understood your testimony, that schedule is the following morning after you receive the cars at Little Lake?

A. That would be—I corrected myself—that would be the next morning, arriving Escanaba at Monday night, arrive next morning.

Q. Now, as I understand you, Mr. MacCarthy, you, on the minimum loaded car of chemical wood, your division of the revenue would be only $35?

A. That is correct.

Q. And out of that you would have to absorb $18.24 per car per diem reclaim and switching absorption?

A. That is right.

Q. And your haul is 92 miles?

A. Right.

Q. That is an extremely confiscatory rate, isn't it?

A. That, right along with others is established by the Chicago North Western or in cooperation with the Chicago North Western were predicated upon volume movements of forest products originating in this territory. Now, I made some notations on the basis of figures submitted here where [fol. 175] it is expected that 2,800 carloads of this traffic will move in five-years time. An extension of our gross revenue of $35 in five-years time becomes very close to a half a million dollars. Four hundred and ninety-two thousand and some odd dollars which is to be lost or greatly endangered by reason of this.

Q. The more of that traffic you lose the better off your railroad is, isn't it?

A. No, I wouldn't say that.

Q. If my figures are correct that traffic would only yield you something like 14 cents a car mile and something less than half a cent a ton mile. Do you know of any traffic on your railroad that yields less than that?

A. Are you aware of the fact that you are now making $18.24 on a car you do not handle and on the basis of revenue as given to me by our traffic department will produce $31. In other words, you are going to handle the same car for—

Q. (Interrupting) I am not asking for about "me", I am asking about you.

Mr. Dickman: I am going to object. I don't see how the reasonableness of the rates is involved in this case.

Mr. Porter: It isn't involved. But here is a witness that says he is going to be hurt by losing the traffic, and it seems

to me that it wouldn't be enough to buy the axle grease on the cars.

Exam. Bradford: I don't see the reasonableness of the [fol. 176] rates. I sustain the objection. He may be very unreasonable, but I don't know. I can't tell from this witness.

Mr. Porter: I think I can demonstrate that the less of that traffic you have to handle the better off—

Mr. Dickman (interrupting): I believe the objection was sustained.

Mr. Porter: Thank you, I am sure it was. I am not pursuing the question.

By Mr. Porter:

Q. Now, you say that if the connection at Republic wasn't there you would get all of the log traffic down to Iron Mountain, Mr. MacCarthy?

A. Yes, sir.

Q. You are aware, are you not, that in order to enjoy these rates the shipper has to—or the receiver has to bring part of this traffic over the Milwaukee Road?

A. I made my statement on the basis of the fact that prior to the establishment of the connection and the publication of rates over Republic Junction there was only one two-line rate to Republic Junction and that was in connection with L. S. and I., and D. S. S. and A.

Q. That is correct, but up until that time much of this traffic was originated at Seney, being trucked down from Seney on the D. S. S. and A., and moving to Iron Mountain by the Milwaukee?

A. Not all by the Milwaukee.

Q. Not all, but some of it?

[fol. 177] A. Right.

Q. And you heard the witnesses say that in order to enjoy the rate, the manufacturing and reshipment rate, they had to bring in traffic over the Milwaukee in proportion to which their outbound products went?

A. I do not propose to critize—

Q. (Interrupting) I did not ask you what you propose to do, I asked if you did hear the witnesses?

A. I did hear, yes.

Q. Did you believe that testimony?

A. As far as the total traffic is concerned, not as far as the Sunrise Landing traffic is concerned.

Q. And you still insist that if the connection at Republic was not continued, you would get all of the log traffic from Sunrise Landing that moved to Iron Mountain?

A. The witness also stated he could not have a three line rate.

Q. Answer yes, or, no.

Exam. Bradford: Let's not argue the matter.

The Witness: We would have had to handle it and at the only rate.

Exam. Bradford: Do you have any questions?

Mr. Porter: That is all.

Cross examination.

By Mr. Nagle:

Q. Mr. MacCarthy, relative to the traffic that was testified to, I didn't get all the information. You gave a com-
[fol. 178] parison of the first five months of '58 and '57, is that at Little Lake?

A. That is at Little Lake.

Q. Including sawlogs and chemical logs?

A. Including all commodities except dock ore.

Q. Systemwide across your railroad, the first five months of '57 and the first five months of '58, isn't it true that your car loading in general were down?

A. They were down.

Q. That was true throughout the country?

A. Yes.

Q. That is the reason that these carloadings, the comparisons were also down?

A. That would be a contributing factor, but not entirely.

Q. You don't know how far, what extent that factor would play, do you?

A. Well, the record shows that there were a total of 1,600 cars in one direction and 1,750 in another moved via the Milwaukee Road which could not have been possible

without the establishment of the connection. If that same traffic had moved, it would have necessarily have had to move by other routes including our own.

Q. And what portion of the record were you referring to?

A. The statement introduced as Exhibit No. 5, shows the Milwaukee Road, number of carloads, by commodities, interchanged at Republic Junction from Ontonagon..

[fol. 179] Q. Mr. MacCarthy, the logs you referred to, wouldn't necessarily have had to move North Western?

A. Any logs originating on the L. S. and I. and moving to Iron Mountain would have had to move on the North Western prior to the establishment of your route and gateway at Republic Junction.

Q. I must have misunderstood your first premise there. You were only referring to the logs, then?

A. I am referring to all of this traffic as being traffic that moved over your gateway which otherwise would have moved over routes existing prior to the establishment of your gateway. Part of that represents our loss of traffic, part of it represents losses by other lines involved.

Mr. Merrill: Just a few questions, if I may, Mr. Examiner?

Exam. Bradford: All right, proceed.

Cross examination.

By Mr. Merrill:

Q. Mr. MacCarthy, when did you first see the prepared statement you introduced in this record today?

A. I prepared that in May of this year. It has been redrafted a number of times since that time to its final form.

Q. Was it redrafted by you, Mr. MacCarthy?

A. Not by me personally.

Q. I notice on page 4 of the prepared statement you have stricken out sentences. Why did you strike those sentences?

A. Primarily because I was not equipped with sufficient [fol. 180] papers on this trip to justify a percentage point

differential which might have appeared in other records. The information was given to me by our accounting department.

Q. You state in your prepared statement, which has been introduced into the record, that the financial history of the C. and N. W. is such that the diversion of traffic from the North Western is a serious matter. "For the first seven months of 1958 our net loss was $1,592,415." Is it not a fact that the best earnings of the Chicago North Western Railway accrue during the last four months of every year?

A. That is generally the history of the North Western Railway.

Q. I refer you to the following statement appearing in the annual report of the Chicago North Western Railway for the year 1957, for its stockholders, the section of the report appearing on Page 3 being a letter to the stockholders, by the president and chairman of the Board of the North Western Railroad, and I read to you this paragraph: "In the year just completed the productivity of your company's personnel showing marked improvement continued to lag behind that of the industry as a whole. This remains your company's basic problem."

Would you contribute your loss in the current year and past year to the failure of the productivity of your company's personnel?

A. I believe that you are referring to a very small portion of the context.

[fol. 181] Q. I invite you to read it further.

A. I remember it very well. I attribute the lack of productivity, which in other words would mean a high cost of operating, on our lines and a low productivity cost, wages spent to be a very large contributing factor in our earnings, it always has been.

Q. Do you know how the traffic density of the Chicago and North Western in the State of Michigan compares with the Chicago, Milwaukee, St. Paul and Pacific Railroad?

A. In Upper Michigan?

Q. Yes, sir.

A. I have not seen a comparative figure. I am not prepared to testify on it.

Q. You are not aware, then, that the Chicago and North Western's density of revenue tons per mile line is—

Mr. Dickman (interrupting): Are you testifying now?

Mr. Merrill: I am asking if he is aware.

By Mr. Merrill:

Q. (continuing) —is five times more than that of Milwaukee Railroad?

A. That our density is?

Q. Yes.

A. I am not surprised. I haven't read that before.

Mr. Dickman: He just asked you, Mr. MacCarthy, if you knew that.

The Witness: No, I did not know it specifically.

[fol. 182] By Mr. Merrill:

Q. I refer you to a statement of rates and capacity density: For the year 1956, Class I railroads in the Western District, prepared by the Executive Committee Statistics Bureau, dated May 28, 1958, refer to you Page 5 of that document, lines 22 and 23, and ask you if the figures appearing there do not bear out the statement, the question which I asked you, whether the density of the Chicago North Western Railroad, revenue tons, carried one mile per mile line are not approximately five times that of the Milwaukee Road in the State of Michigan?

Mr. Dickman: I object to that. I don't believe that has been introduced in evidence, this document he is talking about. I haven't seen it. I object to the question.

Exam. Bradford: Objection sustained.

Mr. MacCarthy, you stated the per diem in regard to the traffic delivered by you at Iron Mountain, 8.94 per car?

The Witness: The per diem rate 8.94 per car was correct.

Exam. Bradford: What would that represent?

The Witness: That would be a reclaim of 2.75 per day which the Milwaukee Road reclaims on us on foreign equipment delivered to them after having line-haul on our railroad.

Exam. Bradford: What did you say now?

The Witness: That is a per diem which accrues while a foreign car which has had a line haul on our railroad is in switching service on the Milwaukee Road, and they reclaim on us for that amount.

[fol. 183] Mr. Merrill: That is just during the time it is in switching, is that not correct?

The Witness: After, it is from the time we deliver to you on load and comes back to us, as an average figure reclaimed under per diem arrangements during the switching operations.

Exam. Bradford: The 8.94 is an average figure rather than set amount?

The Witness: It is either average figure—let me put it this way; In many places there is a reclaim of five days, two days, or whatever the average may be. I am not in a position to say whether this is an average or actual agreement existing in Iron Mountain, but it is one or the other.

Mr. Porter: Mr. MacCarthy, does that include the per diem on the car that would be used for the transportation of these logs?

The Witness: It does not include the per diem we pay the L. S. and I.

Mr. Porter: It does not?

The Witness: It is paid to the Milwaukee, not the L. S. and I.

Mr. Porter: Would you have to pay the L. S. and I.?

The Witness: Additional.

Mr. Porter: Per diem at how much per day?

The Witness: Two seventy-five per day.

Mr. Porter: Two seventy-five per day during the time [fol. 184] the car was in your possession?

The Witness: That is right.

Exam. Bradford: Let's see if I understand that.

The L. S. and I. unload their cars and give them to the North Western at Little Lake. Then when they deliver the car to you per diem starts?

The Witness: That is right. First midnight after.

Exam. Bradford: And do you pay the entire amount, or I mean the amount of per diem that accrues from the time it is delivered to you until it is delivered back into the—

The Witness (interrupting): That's true, and the same way that they would pay on that same rate we might furnish for loading.

Exam. Bradford: Does the Milwaukee pay any amount to the owning carrier?

The Witness: No, that is the reason for the reclaim. They have not had a line haul on the car and they reclaim on the line haul carrier for the per diem which accrues while the car is on their track and switching.

Exam. Bradford: They pay that amount?

The Witness: That is right, they are charged that amount from the owning line and reclaimed from us.

Exam. Bradford: I understand.

Is that all, gentlemen?

Mr. Porter: I have a point on rebuttal.

[fol. 185] That is all I have of this witness.

Mr. Dickman: I have no redirect.

Exam. Bradford: You may be excused.

(Witness excused.)

W. A. ZERBEL was sworn and testified as follows:

Direct examination.

By Mr. Porter:

Q. Would you state your name, address, and occupation?

A. My name is W. J. Zerbel, and address is Lake and Washington Street, Marquette, Michigan. My occupation presently is assistant to the president of the Lake Superior and Ishpeming Railway Company, and I work in various capacities in the accounting department for many years.

Q. Referring to the point just made by Mr. MacCarthy on the decline of traffic interchanged between the North Western and the L. S. and I. at Little Lake, have you prepared an exhibit comparing the traffic interchange with that railroad at Little Lake during periods ending July, 1957, and July, 1958?

A. Yes, sir, I have.

Q. And is that for the first seven months of each of those years?

A. It is from November of the previous year to July of the following year inclusive. In other words, from November, 1956, to July, '57, inclusive and from November, '57, to July, 1958 inclusive.

[fol. 186] Q. Now, have you also tabulated on the same exhibit the number of cars which were interchanged by your line with the Milwaukee at Republic Junction?

A. Yes, sir, I have.

Q. During the period November to July, 1958?

A. Yes, sir.

Q. Are these figures shown on the exhibit which is now being identified as Exhibit No. ?

Exam. Bradford: Twelve.

Mr. Porter: Twelve.

(Applicant's Exhibit No. 12. Witness Zerbel, was marked for identification.)

The Witness: What was the question?

By Mr. Porter:

Q. Are these the figures shown on Exhibit 12?

A. Yes, they are.

Q. And that exhibit is true and correct to the best of your knowledge, is it?

A. It is.

Q. Mr. Zerbel, can we conclude from that exhibit that all of the cars shown in the last column were diverted from the North Western?

A. No, I cannot conclude that at all. It could come from the Soo Line, South Shore, Chicago North Western.

Q. Could we conclude that certainly no more than that [fol. 187] number of cars could have been diverted from the North Western, is that correct?

A. That is true, yes.

Mr. Porter: That is all on direct, Mr. Examiner.

Exam. Bradford: You may cross-examine.

Mr. Beckley: I have no questions.

Cross examination.

By Mr. Dickman:

Q. Mr. Zerbel, on the bottom of your first column, which is, as I understand this exhibit, is the period ended July, 1957, you show that we only got 385 cars; I presume this is, and that for the period ending 1958, we have 856?

A. That is true.

Q. Now, saw and chemical logs?

A. Yes.

Q. Now, the period ending July 1957 was before Sunrise was opened?

A. That was before Sunrise Landing.

Q. And the logs moving out of that area then, were moving through what point?

A. We didn't have Sunrise. They were going through Seney, South Shore and from that area, that logging area.

Q. I see.

Mr. Dickman: No further questions.

(Witness excused.)

OFFER IN EVIDENCE

Mr. Porter: I offer the exhibit.

[fol. 188] Exam. Bradford: Any objections?

(No response.)

Exam. Bradford: Exhibit 12 will be received.

(Applicant's Exhibit No. 12, Witness Zerbel, was received in evidence.)

Mr. Porter: That is all I have.

Exam. Bradford: Everybody through?

Mr. Dickman: We rest.

Exam. Bradford: What do you desire, gentlemen?

Mr. Merrill: I think we should have briefs, Mr. Examiner.

Exam. Bradford: Is that agreeable?

Mr. Dickman: Simultaneous.

Mr. Merrill: I think 60 days ought to be enough time.

Exam. Bradford: Is everyone agreed to 60 days?

Mr. Beckley: I might point out that it is our position that this is unauthorized extension of line. We continue to suffer harm as long as the traffic is diverted from us through this new connection. Now, I am frankly not prepared to file a brief within 60 days, but on the other hand, I submit to the Examiner that he should have determined enough as to the facts here to determine that this is in fact an extension of line which requires the prior approval of the authority and it would seem to me to be incumbent upon the Commission to take such steps appropriate under the statute to terminate the interchange pending the determination.

[fol. 189] Mr. Merrill: Applicant will put in a brief to show that this connection is not one that requires authority by the Commission.

Exam. Bradford: All right. You will have until October 24. There will be a proposed report.

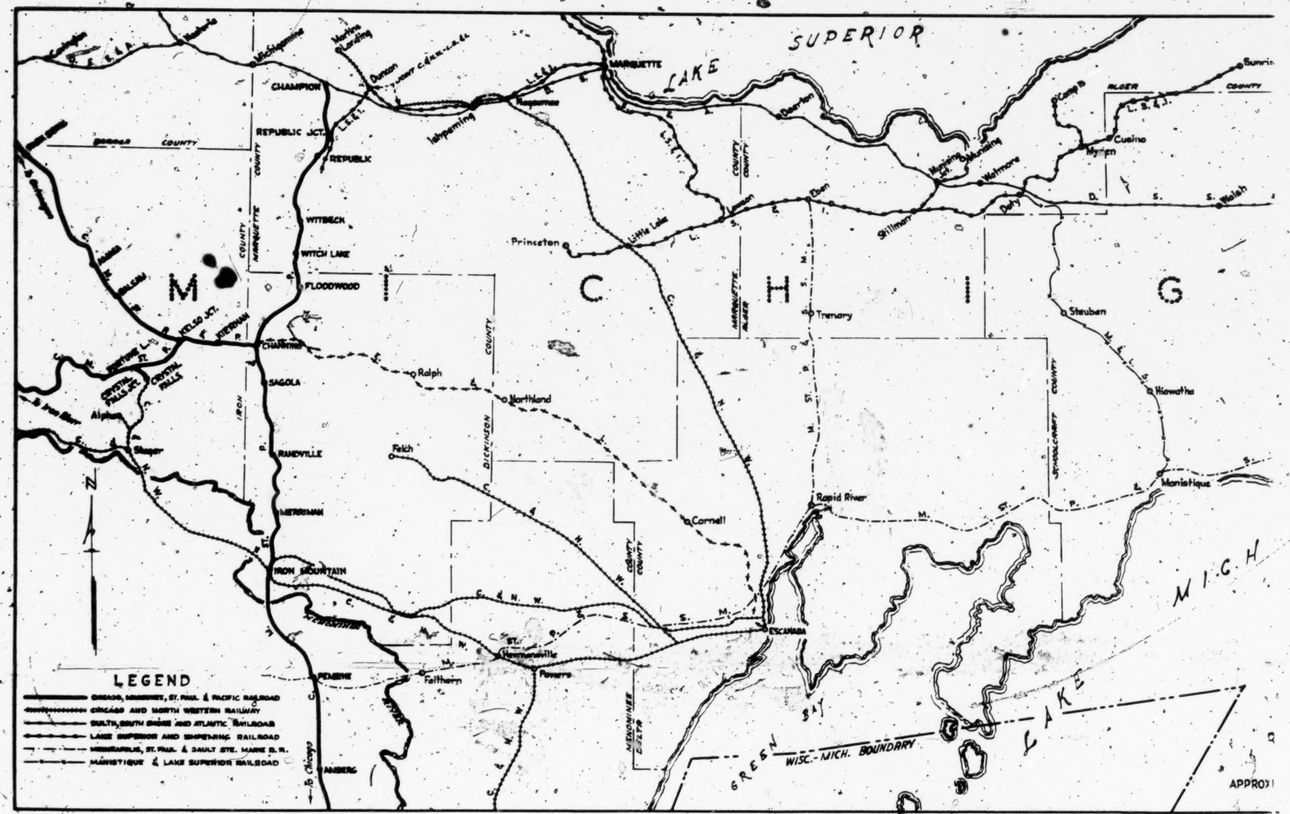
I presume you desire a proposed report.

Is there anything further?

(No response.)

Exam. Bradford: The hearing is closed.

(Whereupon, at 5:45 p.m., the hearing was closed, Friday, September 5, 1958.)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REPUBLIC JCT.
REPUBLIC
WITBECK
WITCH LAKE
FLOODWOOD
KELSO JCT.
VERNON
CRYSTAL FALLS
SAGOLA
RANDVILLE
KERRIMAN
IRON MOUNTAIN
FENCE
FAITHORN
NIAGARA
Princeton
Trenary
Ralph
Northland
Felch
Cornell
Rapid River
ESCANAMBA
Hermansville
Powers
Stephenson
Menominee
Gladstone
Escanaba
Manistique
Hiawatha
Newberry
Munising
Sunrise Landing
Cusino
Myrtle
Walmore
Stillman
Dun
Little Lake
Gwinn
Republic
Witbeck
Witch Lake
Floodwood
Kelso Jct.
Vernon
Crystal Falls
Sagola
Randville
Kerriman
Iron Mountain
Fence
Faithorn
Niagara
Champion
Republic Jct.
Marquette
Harvey
Negaunee
Ishpeming
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Cusino
Myrtle
Walmore
Stillman
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Little Lake
Princeton
Trenary
Ralph
Northland
Felch
Cornell
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Escanaba
Hermansville
Powers
Faithorn
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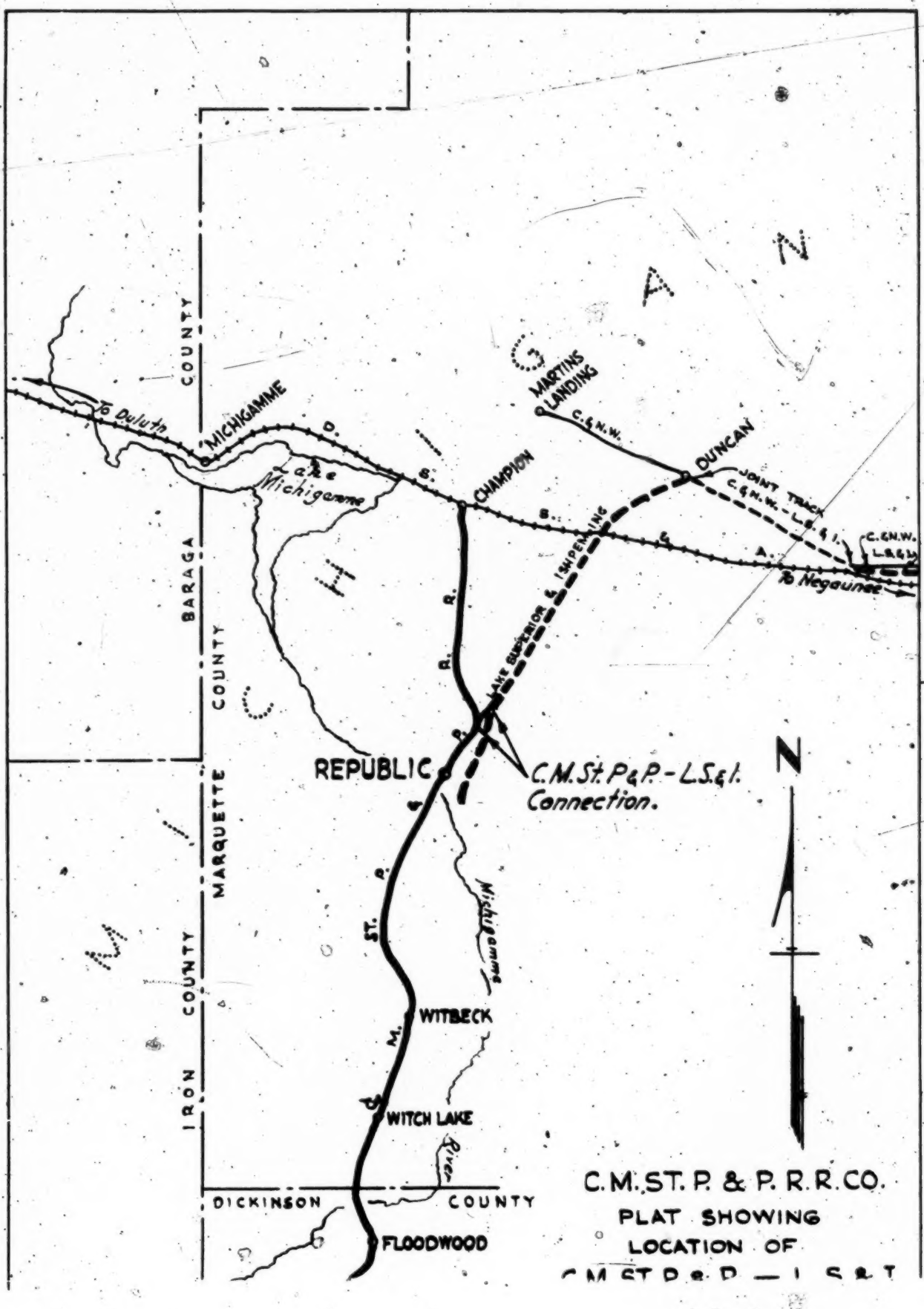
MARTINS LANDING
C. & N. W.
DUNCAN
JOINT TRACK C. & N. W. - L. S. & I.
C. & N. W.
L. S. & I.
To Negaunee
CHAMPION
MICHIGAMME
To Duluth
Lake Michigamme
BARAGA COUNTY
MARQUETTE COUNTY
IRON COUNTY
DICKINSON COUNTY
REPUBLIC
LAKE SUPERIOR & ISHPEMING R. R.
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ST. P.
M. & I. R.
WITBECK
WITCH LAKE
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C. M. ST. P. & P. R. R. CO.
PLAT SHOWING
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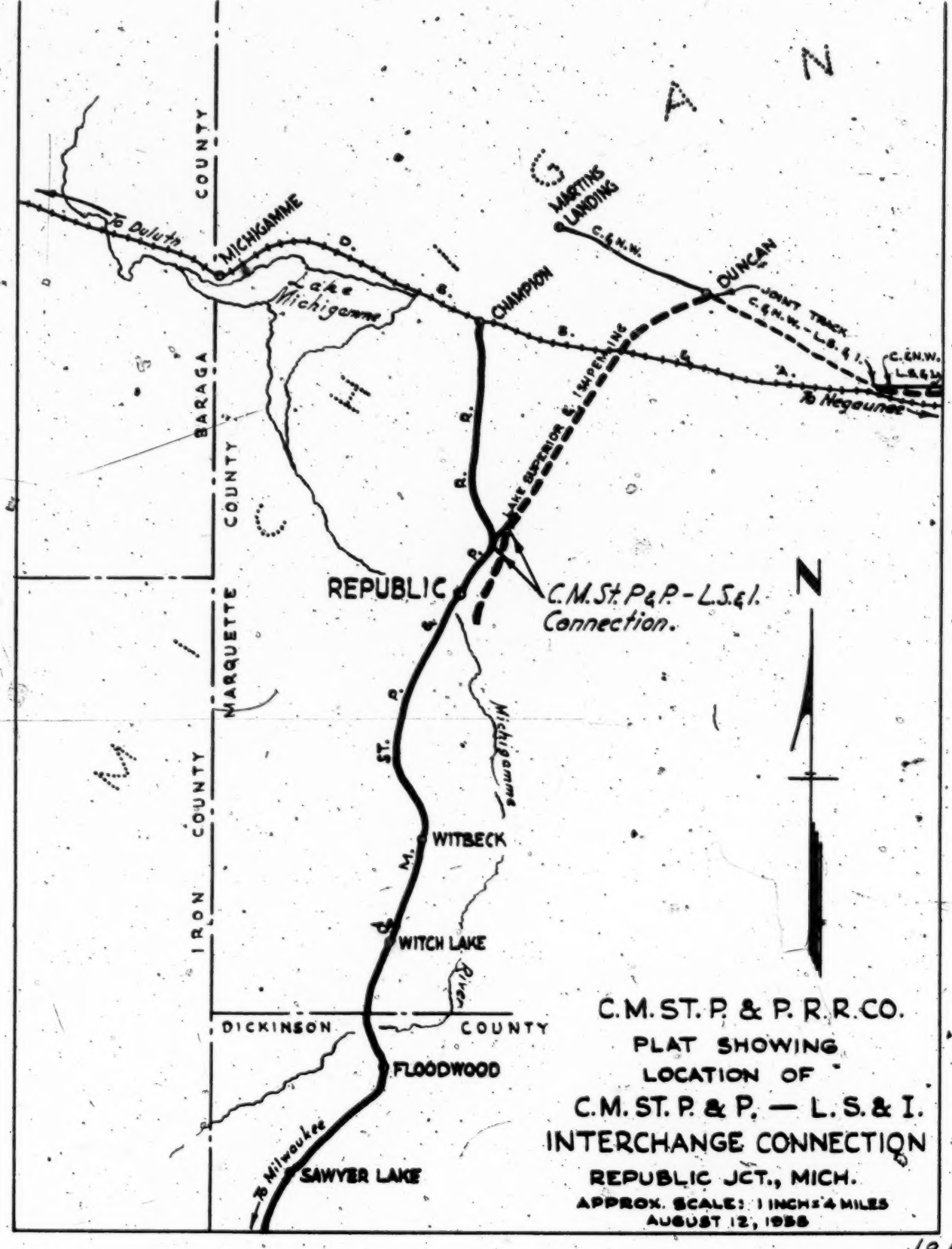
To Duluth
MICHIGAMME
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BARAGA COUNTY
MARTINS LANDING
C.&N.W.
DUNCAN
JOINT TRACK C.&N.W. - L.S.&I.
C.&N.W. L.S.&I.
To Negaunee
CHAMPION
LAKE SUPERIOR & ISHPEMING R.R.
REPUBLIC
C.M.St.P&P - L.S.&I. Connection.
MARQUETTE COUNTY
ST. P. & M.
Michigamme
WITBECK
WITCH LAKE
River
IRON COUNTY
DICKINSON COUNTY
FLOODWOOD
To Milwaukee
SAWYER LAKE
N
C.M. ST. P. & P. R.R. CO.
PLAT SHOWING
LOCATION OF
C.M. ST. P. & P. — L. S. & I.
INTERCHANGE CONNECTION
REPUBLIC JCT., MICH.
APPROX. SCALE: 1 INCH = 4 MILES
AUGUST 12, 1938

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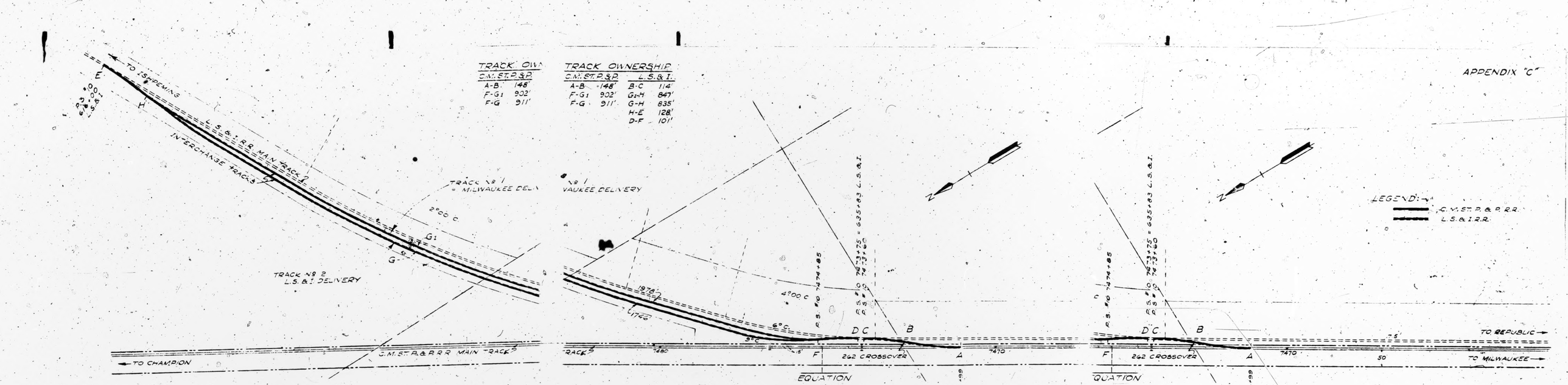
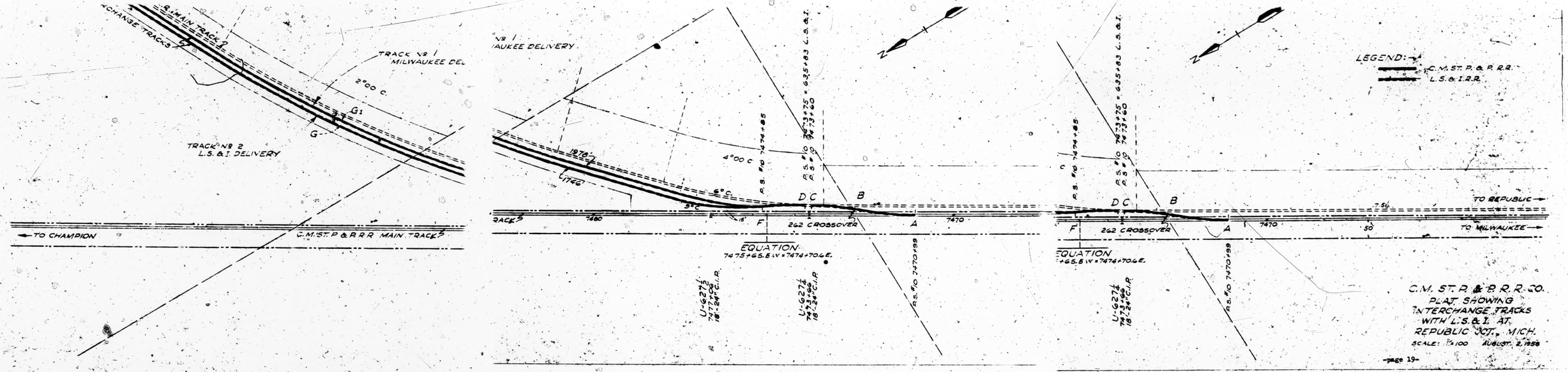
APPENDIX "C"


TRACK OWNERSHIP
C.M.ST.P.&P.
A-B 148'
F-G1 902'
F-G 911'
L.S.&I.
B-C 114'
G1-H 847'
G-H 835'
H-E 128'
D-F 101'
TO ISHPEMING
E
H
L.S.&I. R.R. MAIN TRACK 2
INTERCHANGE TRACKS
TRACK NO 1
MILWAUKEE DELIVERY
2°00 C
G1
G
TRACK NO 2
L.S.&I. DELIVERY
C.M.ST.P.&P.R.R. MAIN TRACK 2
TO CHAMPION
TRACK NO 1
MILWAUKEE DELIVERY
1978'
1760'
4°00 C
6°30 C
5°00 C
P.S. NO 74+85
P.S. = 0
74+73.25 = 635+63 L.S.&I.
74+73.50
D
C
B
F
262 CROSSOVER
A
7470
7480
EQUATION
199
50
TO REPUBLIC
TO MILWAUKEE
LEGEND:
C.M.ST.P.&P.R.R.
L.S.&I.R.R.



C.M. ST. P. & P. R.R. CO.
PLAT SHOWING
INTERCHANGE TRACKS
WITH L.S. & I. AT
REPUBLIC JCT., MICH.
SCALE: 1"=100' AUGUST 2, 1938

[fol. 193] EXHIBIT 4

This agreement entered into this first day of November 1957 between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "Milwaukee Company") and the Lake Superior & Ishpeming Railroad Company (hereinafter called "Ishpeming Company").

WITNESSETH:

Whereas, a segment of main track owned by Milwaukee Company and a segment of main track owned by Ishpeming Company in the S½ of the SE¼ of Section 32, T47N, R26W, and in the NW¼ of the NE¼ of Section 5, T46N, R26W, in the County of Marquette, State of Michigan, are adjacent to each other and the parties hereto are mutually desirous of providing interchange tracks in that area upon the terms and conditions hereinafter set forth for the construction and joint use of those interchange tracks shown in colors blue and red between letters D and E on blueprint hereto attached, marked Exhibit A, and also providing for the construction of a crossover track between Milwaukee Company's line and Ishpeming Company's line as shown on said blueprint between points A and C, and

Whereas, the Ishpeming Company is agreeable to granting the Milwaukee Company the license and permission to use so much of its main line between switches of the interchange track and sufficient tail room to allow engines to come out onto the main line and run around cars on the interchange tracks when necessary for the sole purpose of delivering cars to and receiving cars from the Ishpeming Company.

Now, therefore, in consideration of the premises and the mutual covenants and conditions hereinafter set forth it is hereby agreed by and between the parties hereto as follows:

[fol. 194] SECTION 1—CONSTRUCTION AND MAINTENANCE OF FACILITIES

The cost of constructing and maintaining the said facilities shall be apportioned and paid for as follows:

(a) Turnout one hundred forty-eight (148) feet long shown in red betwen points A and B on the attached Exhibit A to be constructed, owned and maintained by the Milwaukee Company at its sole expense.

(b) Turnout one hundred fourteen (114) feet long shown in blue between points B and C on attached Exhibit A to be constructed by Ishpeming Company, the entire cost thereof to be borne by Milwaukee Company, and the turnout shall become the sole property of Ishpeming Company, but Milwaukee Company shall pay the full cost of improving, maintaining and renewing this turnout in accordance with the terms shown under section 3—use of facilities.

(c) A segment of No. 1 transfer track nine hundred two (902) feet long and a segment of No. 2 transfer track nine hundred eleven (911) feet long including turnout at point F, shown in red between points F, G and G-1 on attached Exhibit A, to be constructed, owned and maintained by Milwaukee Company at its sole expense.

(d) A segment of No. 1 transfer track eight hundred forty-seven (847) feet long and a segment of No. 2 transfer track eight hundred thirty-five (835) feet long between points G, G-1 and H including turnout at point H, turnout one hundred twenty eight (128) feet long between points H and E and turnout one hundred one (101) feet long between points D and F, shown in blue on attached Exhibit A, to be constructed, owned and maintained by Ishpeming Company at its sole expense.

[fol. 195] SECTION 2—LAND FOR MILWAUKEE COMPANY TRACKS

Ishpeming Company grants the Milwaukee Company so much of its land as is necessary for the construction, maintenance, repairs, renewal and operation of the portions of trackage to be constructed, owned and maintained by the Milwaukee Company so long as this agreement shall remain in force.

SECTION 3—USE OF FACILITIES.

In order that joint operation of interchange tracks may be assured, Milwaukee Company grants to Ishpeming Company, without charge, the right to use its interchange tracks shown in red on Exhibit A between points F, G and G-1, and Ishpeming Company grants Milwaukee Company, without charge, right to use its interchange tracks shown in blue on Exhibit A between points D and F and between points G, G-1 and E.

Ishpeming Company grants Milwaukee Company the right to use turnout shown in blue on attached Exhibit A between points B and C, but Milwaukee Company shall bear the whole cost of maintenance and repairs thereof, which, based on a rate for section labor of $1.828 per hour is twenty five ($25.00) dollars per month. If any change occurs in the rate of section labor during any year this maintenance cost shall be adjusted to reflect the same ratio of change effective the first of the year following that in which the change occurs.

SECTION 4—ADDITIONS AND BETTERMENTS TO JOINT FACILITIES

Each party hereto shall bear the total cost of additions and betterments to its wholly owned tracks as described in Section 1 except as follows:

(a) Ishpeming Company shall make all improvements to turnout between points B and C, and additions and better-
[fol. 196] ments costs chargeable to the investment accounts according to the rules and regulations of the Interstate Commerce Commission shall be borne solely by the Milwaukee Company, and become the property of the Ishpeming Company.

(b) The cost of additions and betterments to the jointly used facilities required for the benefit of both parties, and the cost and expense of grade crossings, grade separations, grade crossing protection and other public improvements which may hereafter be required shall be borne and paid by each party equally.

(c) It is contemplated by the parties hereto that protective signals on the Ishpeming Company's main line will not be necessary, however, in the event that any governmental body shall require them, or due to the existence and use of these interchange tracks Ishpeming Company finds it necessary that signals, spring or power switches or other devices be installed to govern the movement of trains on Ishpeming Company's main track at or about this point of interchange, Ishpeming Company shall install, maintain, repair and renew such protective equipment and the cost thereof shall be borne equally by both parties hereto.

SECTION 5—OPERATION OF JOINT FACILITIES

(a) Milwaukee Company shall deliver cars to Ishpeming Company on track designated as track No. 1 and Ishpeming Company shall deliver cars to Milwaukee Company on track designated as track No. 2 on Exhibit A.

(b) Waybill lists shall be transferred through a waybill box provided by Ishpeming Company and placed at a convenient location.

[fol. 197] (c) The manner in which said jointly used tracks shall be operated in common, other than as stated in paragraphs (a) and (b) of this section, shall be from time to time agreed upon by the respective superintendents then having charge of the division of each party to which said tracks shall then belong. If such superintendents cannot agree upon the manner of such use, the same shall be agreed upon by the General Superintendents or General Managers of the respective parties.

SECTION 6—RETIREMENT LOSSES

Each party hereto shall bear retirement losses on its wholly owned tracks as described in Section 1 except that in the event of the retirement of Track "B-C", Milwaukee Company will assume the cost of dismantling, less salvage, and restoring Ishpeming Company's track and property to their former condition.

Retirement losses as a result of additions and betterments required for the benefit of both parties or retirement losses in connection with jointly owned property shall be borne equally by each party hereto.

SECTION 7—BILLING FOR EXPENSES

(a) The method and manner of keeping accounts in connection with the construction, operation, maintenance, repair and renewal of the joint facilities and the construction and installation of additions, betterments and extensions thereto and changes therein shall at all times be in accordance with the then current applicable accounting rules of the Interstate Commerce Commission.

[fol. 198] (b) Bills for fixed charges shown in Section 3 shall be rendered annually in December of each year.

(c) All bills for construction and other expenses shall include the items, amounts, percentages, etc. then currently in effect under the rules and regulations of the General Managers' Association of Chicago. All such bills shall be rendered monthly and be promptly paid by the debtor company.

SECTION 8—TAXES

It is understood and agreed that each of the parties hereto will report its undivided interest in the joint facilities provided for herein to the proper assessing body or officer for taxation to which it is subject, and each of said parties shall pay direct all taxes and assessments which shall be assessed against its undivided interest.

SECTION 9—ABANDONMENT OF LINES

(a) In the event that either party hereto shall abandon or desire to abandon its section of the joint interchange tracks or any portion thereof, it shall give notice thereof to the other party hereto at least sixty (60) days in advance of the date on which it shall stop using the joint tracks or the portion thereof which it desires to abandon and the party receiving such notice agrees, if it desires to continue

operation, to purchase the interest of the other party in and to the joint facility or such portion thereof to be abandoned and shall pay such party the net salvage value thereof.

(b) In the event both parties shall abandon or desire to abandon use of the joint track or a portion thereof then in such event the parties hereto shall dismantle the joint facility or the portion thereof involved and the salvage of each [fol. 199] part thereof shall be divided between the parties on the basis of their respective ownership therein.

SECTION 10—MAINTAINING COMPANY TO EXERCISE REASONABLE AND CUSTOMARY CARE

(a) The party hereto obligated hereunder with the duty of performing the work of constructing, installing, maintaining, repairing and renewing a facility which is also used by the other party hereto shall be bound to use only reasonable and customary care, skill, and diligence in so constructing, installing, maintaining, repairing and renewing such facility and the other party hereto shall not, by reason of any defect in any portion of such facility, or by reason of the failure or negligence of the maintaining party to repair any such defect, have or make against the maintaining party hereto any claim for loss, damage or injury arising from such defect, negligence or failure.

(b) If any party charged with the maintenance of any of the above described tracks shall fail to make necessary repairs and renewals to said tracks, the other party may, after ten (10) days notice in writing, make such repairs and renewals and bill against the other party for its proportion of the expenses thereof.

SECTION 11—LIABILITY AND INDEMNITY

Employees of the respective parties hereto while engaged in the construction, maintenance, repair, renewal, relocation or reconstruction of wholly owned property shall, for the purpose of fixing liability under this section, be considered and held to be sole employees of the party owning the property, provided, however, that employees of Ish- [fol. 200] peming Company while engaged in the construc-

tion, maintenance, repair, renewal, relocation or reconstruction of the turnout between points "B" and "C" shall, for the purpose of fixing liability under this section, be considered and held to be employees of Milwaukee Company.

Employees of the parties hereto while engaged in the construction, maintenance, repair, renewal, relocation or reconstruction of any facilities subsequently jointly owned shall, for the purpose of fixing liability under this section, be considered and held to be joint employees of the parties hereto.

For the purpose of determining as between the parties hereto the bearing of damages as hereinafter defined, occurring in or in connection with the construction, maintenance, repair, renewal or operation of the trackage upon which both parties hereto will operate pursuant to the provisions of this agreement, the following provisions shall be observed by the parties hereto and shall govern.

(a) The term damages as used in these liability provisions shall include (1) expenses for or on account of injuries to or death of persons; (2) expenses for or on account of loss or damages to property; and (3) costs, fees and other expenses in connection with such loss, damage, injury or death, exclusive of compensation of regularly retained salaried attorneys and claim agents.

(b) When the operation of trains, engines and cars of only one of the parties hereto is involved, such party hereby agrees to save the other party hereto harmless from all damages caused solely by the negligent acts or omissions [fol. 201] of its own sole employees or defects in its engines, trains or cars whether with or without the fault of joint employees.

(c) In the event that there shall be a collision on any of the tracks in this agreement described, on which the parties hereto both operate, between engines, trains or cars operated by the Milwaukee Company and engines, trains or cars operated by the Ishpeming Company (1) if such collision shall be caused by the sole negligence of one of the parties hereto, whether with or without the negligence of joint employees, the party hereto whose sole employees are

at fault shall bear and pay all such damages resulting from such collision; and (2) if such collision shall be due to joint or concurring negligence of sole employees of the Milwaukee Company on the one hand and of sole employees of the Ishpeming Company on the other hand, whether with or without the concurring negligence of joint employees, the Milwaukee Company on the one hand and the Ishpeming Company on the other hand, shall each bear and pay the damages to its engines and cars and persons in or contents of such cars and to its sole employees, and other damages, if any, shall be divided in equal amounts between the parties hereto.

(d) In the case of damages caused by the negligent acts or omissions of joint employees, as hereinbefore defined, or caused otherwise than as hereinbefore described, or in cases where responsibility for damages cannot be determined, or where liability therefor is not covered by any other liability provision in this agreement contained, such damage shall be borne and paid by each of the said parties as to its own [fol. 202] property and as to property within its custody and as to its sole employees and passengers. Damage caused as aforesaid to joint employees and to any other persons and property other than hereinbefore described and to jointly used track covered by this agreement shall be borne jointly and equally by the parties hereto.

(e) If either party hereto shall pay or be compelled to pay any sum or sums for which the other party hereto is liable under the provisions of this agreement, the party liable therefor hereunder agrees to repay, to the paying party, such sum or sums, together with all costs and expense incident thereto, promptly and upon receipt of bill therefor; provided, however, that neither party hereto shall pay any such sum for which it is not liable under the provisions hereof, without giving to the other party hereto, an opportunity to assume or defend against, the payment thereof.

(f) In case a suit or suits shall be commenced against either party hereto for or on account of any damages for which the other party hereto is liable under the provisions

of this agreement, the party so sued shall give to the other party hereto prompt notice in writing of the pendency of such suit, and thereupon, the party notified shall assume the defense of said suit and shall save and hold harmless the party so sued from all loss, cost and expense by reason thereof. Neither party hereto shall be concluded by any judgment against the other party hereto unless it shall have received reasonable notice that it is required to defend and shall have had reasonable opportunity to make such defense. [fol. 203] When such notice and opportunity shall have been given, the party so notified shall be concluded by the judgment as to all matters which could have been litigated in such suit.

SECTION 12—TERM OF AGREEMENT

This agreement shall continue in full force and effect until cancelled by either of the said parties hereto on six (6) months' notice to be given in writing to the General Manager or chief operating officer of the other party.

This agreement shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

In witness whereof the parties hereto have executed this agreement as of the day and year first herein written.

Attest: CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

..... By .....
Secretary President

Attest: LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY

..... By .....
Secretary President

[fol. 204] Clerk's Note:

Map entitled, "L.S.&I. and C.M.St.P. & P.—Interchange Tracks at Republic Junction, January 6, 1958" is omitted from the record here. Please see page 59.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY
Finance and Accounting Department

STATEMENT SHOWING THE NUMBER OF CARLOADS, BY COMMODITIES, INTERCHANGED AT REPUBLIC JUNCTION, MICHIGAN DURING THE PERIOD OCTOBER 21, 1957 THROUGH JUNE 30, 1958

Line No.	Item	No. of Carloads
1	(A) TRAFFIC ORIGINATED ON LS&I TERMINATED ON CMStP&P	
2	Charcoal	79
3	Sawdust	22
4	Lumber	7
5	Ore	12
6	Scrap Metal	1
7	Paper	7
8	Logs	545
9	Chemical Wood	955
10	Methanol	1
11	Total	1,629
12	(B) TRAFFIC ORIGINATED ON LS&I TERMINATED BEYOND CMStP&P (CMStP&P BRIDGE TRAFFIC)	
13	Charcoal	23
14	Flooring	4
15	Ore	15
16	Machinery	4
17	Paper	4
18	Total	50
19	(C) TRAFFIC ORIGINATED ON CMStP&P TERMINATED ON LS&I	
20	Chemical Wood	29
21	Cement	7
22	Paper	3
23	Oil and Gasoline	5
24	Roofing	4
25	Scrap Metal	1
26	Machinery and Parts	2
27	Total	51
28	(D) TRAFFIC ORIGINATED ON FOREIGN LINES TERMINATED ON LS&I (CMStP&P BRIDGE TRAFFIC)	
29	Steel	5
30	Tractors	3
31	Aluminum	2
32	Fatty Acid	2
33	Stone Ruble	2
34	Oil	1
35	Lumber	1
36	Building Material	3

Line No.	Item	No. of Carloads
1	(A) TRAFFIC ORIGINATED ON LS&I TERMINATED ON CMStP&P	
2	Charcoal	79
3	Sawdust	22
4	Lumber	7
5	Ore	12
6	Scrap Metal	1
7	Paper	7
8	Logs	545
9	Chemical Wood	955
10	Methanol	1
11	Total	1,629
12	(B) TRAFFIC ORIGINATED ON LS&I TERMINATED BEYOND CMStP&P (CMStP&P BRIDGE TRAFFIC)	
13	Charcoal	23
14	Flooring	4
15	Ore	15
16	Machinery	4
17	Paper	4
18	Total	50
19	(C) TRAFFIC ORIGINATED ON CMStP&P TERMINATED ON LS&I	
20	Chemical Wood	29
21	Cement	7
22	Paper	3
23	Oil and Gasoline	5
24	Roofing	4
25	Scrap Metal	1
26	Machinery and Parts	2
27	Total	51
28	(D) TRAFFIC ORIGINATED ON FOREIGN LINES TERMINATED ON LS&I (CMStP&P BRIDGE TRAFFIC)	
29	Steel	5
30	Tractors	3
31	Aluminum	2
32	Fatty Acid	2
33	Stone Ruble	2
34	Oil	1
35	Lumber	1
36	Building Material	3
37	Miscellaneous	7
38	Total	26
39	Grand Total All Traffic	1,756

Office of Vice President and Comptroller,
Chicago, Illinois

[fol. 206] EXHIBIT 6

Exhibit 1 (b)

CERTIFIED COPY OF RESOLUTION

I, ARNOLD YELLAND, do hereby certify that I am the Secretary of the Lake Superior & Ishpeming Railroad Company, a Michigan corporation, and that I have custody of the minutes of meetings of shareholders and directors of said company, and also custody of the corporate seal. I do further hereby certify that at a special meeting of the Board of Directors of said company duly called and held at the offices of said company at Marquette, Michigan on the 6th day of March, 1958, at 10:00 AM, at which meeting a quorum was present, the following resolution was duly moved, seconded and unanimously adopted:

"WHEREAS, the Lake Superior & Ishpeming Railroad Company established a connection with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Republic, Michigan in 1957, consisting of interchange tracks over which said railroad companies have been interchanging traffic, and,

WHEREAS, the Duluth, South Shore & Atlantic Railroad Co. has filed a complaint with the Interstate Commerce Commission on the ground that said railroads established said connection without securing approval of said Commission, and,

WHEREAS, said railroads did not apply for permission to establish said connection for the reason that they were of the belief that no such permission was required, and,

WHEREAS, in order to remove all doubt as to the legality of such connection and to secure authority to

maintain the same if it should be determined that authority is necessary, application to the Commission should be made,

NOW, THEREFORE, BE IT RESOLVED that the Lake Superior & Ishpeming Railroad Company, either individually or jointly with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, file an application with the Interstate Commerce Commission under Section 1 (18) of the Interstate Commerce Act to legalize and authorize the connection between the tracks and facilities of this railroad company and those of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company at Republic, Michigan, and also to legalize and authorize the operations of said railroads over said connection.

BE IT FURTHER RESOLVED that J. H. Kline, President of the Lake Superior & Ishpeming Railroad Company, and W. A. Zerbel, Assistant to the President, and either of them be and are hereby authorized, empowered and [fol. 207] directed for and on behalf of the Lake Superior & Ishpeming Railroad Company to make, execute and file such application or applications as may be necessary to said Commission and to do any and all other things necessary and proper in order to effectuate the foregoing."

IN WITNESS WHEREOF I have hereunto set my hand and the seal of said corporation this 7th day of March, 1958.

/s/ A. E. YELLAND
Secretary

Statement of Carloads Logs and Chemical Wood

Originating at Ewalt's Landing (now known as Sunrise Landing), Cusino, and Williams Crossing, Michigan, Points on LS&I, to Iron Mountain and Amasa, Michigan, Points on CMStP&P, with Divisions and Revenue for Each Line via LS&I - Republic Junction, Michigan - CMStP&P.

Period November 1957 Through and Including July 1958.

1957	From	To	Commodity	Cars	%	LS&I Proportion
November	Ewalt's Landing, Michigan	Iron Mountain, Michigan	Logs	69	70	6,890.39
"	" " "	Amasa, "	"	34	72	5,507.00
December	" " "	Iron Mountain, "	"	52	72	6,299.26
"	" " "	" " "	Chemical Wood	104	70	9,329.32
"	Cusino, Michigan	" " "	"	1	70	80.54
"	Ewalt's Landing, Michigan	Amasa, "	Logs	16	72	1,836.18
"	" " "	Iron Mountain, "	"	3	72	338.44
"	" " "	" " "	Chemical Wood	19	70	1,643.15
1958						
January	Ewalt's Landing, Michigan	Iron Mountain, Michigan	Logs	50	72	5,905.60
"	" " "	" " "	Chemical Wood	149	70	13,589.03
"	" " "	Amasa, "	Logs	18	72	2,130.83
"	" " "	Iron Mountain, "	"	6	72	744.31
"	" " "	" " "	Chemical Wood	19	70	1,769.25
"	" " "	Amasa, "	Logs	17	72	2,023.66
"	" " "	Iron Mountain, "	"	53	72	6,088.62
"	" " "	" " "	Chemical Wood	97	70	8,473.29
February	" " "	" " "	Logs	68	72	7,373.36
"	" " "	" " "	Chemical Wood	139	70	12,684.19
"	" " "	Amasa, "	Logs	4	72	427.10
"	" " "	Iron Mountain, "	"	23	72	2,465.72
"	" " "	" " "	[illegible]mical Wood	17	70	1,545.81
"	" " "	" " "	Logs	4	72	493.39
"	" " "	" " "	Chemical Wood	20	70	1,775.97
"	" " "	Amasa, "	Logs	16	72	1,842.56
March	" " "	Iron Mountain, "	"	153	72	16,941.35
"	" " "	" " "	Chemical Wood	160	70	14,895.85
"	" " "	" " "	Logs	19	72	2,115.06
"	" " "	" " "	Chemical Wood	6	70	543.80
"	" " "	" " "	Logs	1	72	97.96
"	" " "	" " "	"	1	72	125.70
"	" " "	" " "	"	35	72	3,985.42
April	" " "	" " "	Chemical Wood	62	70	5,653.52
"	Williams Crossing, "	" " "	Logs	14	72	1,555.10
"	Ewalt's Landing, "	" " "	Chemical Wood	1	72	66.10
			"	9	72	638.15
				1,459		147,874.98

Statement of Carloads Logs and Chemical Wood

Originating at Ewalt's Landing (now known as Sunrise Landing), Cusino, and Williams Crossing, Michigan, Points on LS&I, to Iron Mountain and Amasa, Michigan, Points on CMStP&P, with Divisions and Revenue for Each Line via LS&I - Republic Junction, Michigan - CMStP&P.

Period November 1957 Through and Including July 1958.

om	To	Commodity	Cars	%	LS&I Proportion	%	CMStP&P Proportion
anding, Michigan	Iron Mountain, Michigan	Logs	69	70	6,890.39	30	2,953.02
" "	Amasa, "	"	34	72	5,507.00	28	2,141.61
" "	Iron Mountain, "	"	52	72	6,299.26	28	2,449.71
" "	" " "	Chemical Wood	104	70	9,329.32	30	3,998.28
ichigan	" " "	"	1	70	80.54	30	34.51
anding, Michigan	Amasa, "	Logs	16	72	1,836.18	28	714.07
" "	Iron Mountain, "	"	3	72	338.44	28	131.61
" "	" " "	Chemical Wood	19	70	1,643.15	30	704.20
anding, Michigan	Iron Mountain, Michigan	Logs	50	72	5,905.60	28	2,296.62
" "	" " "	Chemical Wood	149	70	13,589.03	30	5,823.87
" "	Amasa, "	Logs	18	72	2,130.83	28	828.66
" "	Iron Mountain, "	"	6	72	744.31	28	289.46
" "	" " "	Chemical Wood	19	70	1,769.25	30	758.25
" "	Amasa, "	Logs	17	72	2,023.66	28	786.98
" "	Iron Mountain, "	"	53	72	6,088.62	28	2,367.80
" "	" " "	Chemical Wood	97	70	8,473.29	30	3,631.41
" "	" " "	Logs	68	72	7,373.36	28	2,867.42
" "	" " "	Chemical Wood	139	70	12,684.19	30	5,436.08
" "	Amasa, "	Logs	4	72	427.10	28	166.10
" "	Iron Mountain, "	"	23	72	2,465.72	28	958.89
" "	" " "	[illegible]mical Wood	17	70	1,545.81	30	662.49
" "	" " "	Logs	4	72	493.39	28	191.88
" "	" " "	Chemical Wood	20	70	1,775.97	30	761.13
" "	Amasa, "	Logs	16	72	1,842.56	28	716.55
" "	Iron Mountain, "	"	153	72	16,941.35	28	6,588.30
" "	" " "	Chemical Wood	160	70	14,895.85	30	6,383.93
" "	" " "	Logs	19	72	2,115.06	28	822.52
" "	" " "	Chemical Wood	6	70	543.80	30	233.05
" "	" " "	Logs	1	72	97.96	28	38.09
" "	" " "	"	1	72	125.70	28	48.89
" "	" " "	"	35	72	3,985.42	28	1,549.89
" "	" " "	Chemical Wood	62	70	5,653.52	30	2,422.93
" "	" " "	Logs	14	72	1,555.10	28	604.76
Crossing, "	" " "	Chemical Wood	1	72	66.10	28	25.70
anding, "	" " "	"	9	72	638.15	28	248.70
			1,459		147,874.98		60,637.36

Statement of Carloads Logs and Chemical Wood Originating at Points on LS&I to Points on CMStP&P (Cont'd

1958	From	To	Commodity	Cars	%	LS&I Proportion
July	Williams, Crossing, Michigan	Iron Mountain, Michigan	Chemical Wood	20	70	1,596.08
"	Sunrise Landing, "	" " "	Logs	1	72	89.95
"	" " "	" " "	Chemical Wood	2	70	149.18
"	" " "	" " "	"	77	70	5,263.52
"	" " "	" " "	"	20	70	1,358.36
"	" " "	" " "	"	33	70	2,158.72
"	" " "	" " "	Logs	2	72	177.47
"	Williams Crossing, "	" " "	Chemical Wood	22	70	1,676.05
"	Sunrise Landing, "	" " "	Logs	3	72	293.76
"	Williams Crossing, "	" " "	Chemical Wood	13	70	1,016.74
"	Sunrise Landing, "	" " "	"	42	70	2,759.65
"	" " "	" " "	"	17	70	1,113.17
"	Williams Crossing, "	" " "	"	1	70	75.01
"	" " "	" " "	"	1	70	68.63
"	Sunrise Landing, "	" " "	Logs	1	72	79.96
"	" " "	" " "	Chemical Wood	18	70	1,279.40
				273		19,155.65
		(Brought Forward)		1,459		147,874.98
		Logs 663)		1,732		$167,030.63
		Chemical Wood 1,069)				

Statement of Carloads Logs and Chemical Wood Originating at Points on LS&I to Points on CMStP&P (Cont'd.)

From	To	Commodity	Cars	%	LS&I Proportion	%	CMStP&P Proportion
Williams, Crossing, Michigan	Iron Mountain, Michigan	Chemical Wood	20	70	1,596.08	30	684.04
Sunrise Landing, "	" " "	Logs	1	72	89.95	28	34.98
" " "	" " "	Chemical Wood	2	70	149.18	30	63.94
" " "	" " "	"	77	70	5,263.52	30	2,255.80
" " "	" " "	"	20	70	1,358.36	30	582.16
" " "	" " "	"	33	70	2,158.72	30	925.16
" " "	" " "	Logs	2	72	177.47	28	69.01
Williams Crossing, "	" " "	Chemical Wood	22	70	1,676.05	30	718.31
Sunrise Landing, "	" " "	Logs	3	72	293.76	28	114.24
Williams Crossing, "	" " "	Chemical Wood	13	70	1,016.74	30	435.74
Sunrise Landing, "	" " "	"	42	70	2,759.65	30	1,182.71
" "	" " "	"	17	70	1,113.17	30	477.07
Williams Crossing, "	" " "	"	1	70	75.01	30	32.15
" "	" " "	"	1	70	68.63	30	29.41
Sunrise Landing, "	" " "	Logs	1	72	79.96	28	31.09
" "	" " "	Chemical Wood	18	70	1,279.40	30	548.32
			273		19,155.65		8,184.13
	(Brought Forward)		1,459		147,874.98		60,637.36
	Logs 663)		1,732		$167,030.63		$68,821.49
	Chemical Wood 1,069)						

[fol. 210]

I.C.C. Docket No. 20048 and Docket No. 20139

Witness H. Beaudry

EXHIBIT 8

Intervenor's Page 1

TRAFFIC INTERCHANGED BY THE DSS&A R.R. WITH THE CMStP&P R.R. AT CHAMPION, MICHIGAN FOR PERIOD NOVEMBER 1, 1956 TO OCTOBER 31, 1957, ORIGINATING OR TERMINATING AT:

DSS&A R.R., ISHPEMING, MICHIGAN

Commodity	*Number of Carloads*
Fuel Oil	103
Meat	47
Mine Lagging	9
Apples	2
Oranges	6
Lettuce	2
Bananas	2
Fertilizer	1
Potatoes	5
Tomatoes	1
Peaches	2
Coal Briquettes	3
Cement	7
Insulation Wool	1
Rails	1
Machinery	1
Anti-freeze	1
Lumber	2
Flooring	10
Iron Ore	8
Sawdust	14
Oxygen	1
Fruit & Vegetables	6
	235

[fol. 211]

DSS&A R.R., NEGAUNEE, MICHIGAN

Commodity	*Number of Carloads*
Coal	2
Furniture	8
Refrigerators & Stoves	1
Rails	1
Insulation	1
Wallboard	1
	14

DSS&A R.R., MARQUETTE, MICHIGAN

Commodity	*Number of Carloads*
Tractors	14
Transformers	2
Poles	4
Elec. Equipment	1
Native Wood	1
Scrap Iron	11
Sand	4
Steel, Plates, etc.	2
Corn Flour	17
Cement	7
Pipe, sewer, etc.	2
Lumber	23
Veneer	5
Structural Steel	5
Insulation	2
Soybean Oil	1
Construction Equipment	1
Vermiculite	1
Lime	1
Fertilizer	3

[fol. 212]

DSS&A R.R., MARGUETTE, MICHIGAN (Cont'd)

Commodity	*Number of Carloads*
Pet. Wax	4
Wallboard	5
Roofing	7
Shingles & Siding	4
Fuel Oil	62
Brick	2
Flour	2
Gasoline	19
Petroleum Products	29
Furnaces	1
Anti-freeze	2
Septic Tanks	1
Furniture	1
Paper Towels	2
Wire	1
Fab. Houses	1
Cabinets	1
Charcoal	134
Methanol	2
Coal	20
Power Boat	1
Veneer Cores	15
Wood	1
Chemical Wood	3
Empty Drums	1
	428

LS&I STATIONS

Commodity	*Number of Carloads*
Paper	17
Oxygen	1
Resin	1
Shovel	1
Rosin	11
Sheet Iron	1
Machinery	4
Roofing	4
Crusher	1
Asphalt	1
Pulpwood	5
Paste	1
Wallboard	5
Lumber	4
Castings	2
Woodpulp	13
Cement	42
Merchandise	1
Steel Piling	1
Drill	1
Steel Rail	1
	118

COMPARATIVE RATE OF RETURN

YEARS 1953 THROUGH 1957

Year	LS&I RR. CO. (%)	CNSTPnP RR. CO. (%)	[illegible] RR. CO. (%)	C&NW RY. CO. (%)
1953	10.23	1.92	1.81	1.54
1954	6.04	1.91	1.28	1.38
1955	14.12	2.06	3.22	1.29
1956	10.84	2.24	3.82	.15
1957	9.56	2.10	.88	.89
AVERAGE	10.2	2.06	2.22	1.04

RATE OF RETURN OF NET RAILWAY OPERATING
INCOME ON AVERAGE NET INVESTMENT
FOR TRANSPORTATION PURPOSES
YEARS 1953 THROUGH 1957

D. S. S. & A. RR. CO:

	1953	1954	1955	1956	1957
Road and Equipment	25713153.	26639636.	26751997.	26982587.	27564351.
Depr'n - Reduct	4478192	4688884	4923107	5266854	5565716
Cash	553598	419041	492110	710358	623008
Matl & Suppl.	1176660	1171207	1011384	992123	1074471
Net Invest.	$ 22964219	23363980	23332284	23418214	23696114
Net Ry. Oper. Income	$ 441878	301041	751771	893945	209164
Ret. on Invest. - %	1.92	1.28	3.22	3.82	0.88

C. & N. W. RY. CO.:

	1953	1954	1955	1956	1957
Road and Equipment	757511523	769617194	781101203	793830548	799717386
Depr'n - Reduct	207541360	208120700	211301961	213567275	216418885
Cash	9042381	7163576	6018618	9172584	8697463
Matl. & Suppl.	20850737	20500391	19009681	17708143	19476447
Net Invest.	$ 579963981	588160461	594917541	607164000	611472410
Net Ry. Oper. Income	8956455	8101951	7666648	931295	5456402
Ret. on Invest - %	1.54	1.38	1.29	0.15	0.89

C.M.ST.P. & P. RR. CO.:

	1953	1954	1955	1956	1957
Road and Equipment	$ 941744174	946381747	951734807	964715551	981348079
Depr'n - Reduct	239153243	240451874	238387609	243346729	251108566
Cash	31873482	34160060	32863684	32247396	27428649
Matl & Suppl.	27420186	23888031	20438033	22054726	23828951
Net Invest.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Net Ry. Oper. Income	$ 14663688	14568518	18780325	17344934	16418693
Ret. on Invest - %	1.92	1.91	2.06	2.24	2.10

L.S. & I. RR. Co.

	1953	1954	1955	1956	1957
Net Invest	$ 9304979	10478969	10579178	10960842	12008778
Net Ry. Oper. Income	952398	632856	1493254	1188443	1147625
Ret. on Invest. - %	10.23	6.04	14.12	10.84	9.56

Sources: RSSA, CSAV, CSTPSF - I.C.C. Annual Report Form A, Schedules 200A (Cash and Material and Supplies),
211A (Road and Equipment Property and Depreciation).
300 (Net Railway Operating Income).

ESCE - Exhibit 8 of Railroads' Reply Verified, Statement No. W-33, Ex Parte No. 212, Increased Freight Rates, 1958.

Note: Net investments of RSSA, CSAV and CSTPSF are averages of the balances of the beginning and end of each year

[fol. 217]

EXHIBIT 10

INTERSTATE COMMERCE COMMISSION

WASHINGTON 25, D. C.

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Pages 7 to 12, both inclusive, of Application for Construction of an Extension to a Branch Line and Return to Questionnaire filed by Lake Superior & Ishpeming Railroad Company on May 28, 1948, and

Report and Order of the Commission filed and entered September 8, 1948,

in Finance Docket No. 16129, Lake Superior & Ishpeming Railroad Company Construction, and

Exhibit "H" to Application for Construction of an Extension to a Branch Line and Return to Questionnaire filed by Lake Superior & Ishpeming Railroad Company on October 6, 1955,

Pages 59 to 61, both inclusive, page 114, and pages 118 to 122, both inclusive, of the transcript of the stenographer's notes of the hearing held February 7, 1956, at Washington, D.C.,

Pages 18 to 20, both inclusive, of Applicant's Reply to Exceptions of Intervener, Duluth, South Shore and Atlantic Railroad Company, filed July 30, 1956,

Page 6 of Report and Order of the Commission, entered November 28, 1956, and

Pages 2 to 4, both inclusive, of Applicant's Reply to Intervener's Petition for Reconsideration, filed January 28, 1957,

in Finance Docket No. 19084, Lake Superior & Ishpeming Railroad Company Construction, the originals of which

are now on file and of record in the office of the Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Commission this 27th day of August 1958.

(Seal)

/s/ HAROLD D. McCOY
Secretary of the Interstate Commerce Commission

EXCERPTS FROM APPLICATION FOR CONSTRUCTION

—7—

[Handwritten notation—Filed 5/28/48]

[fol. 218] Q-4. Whether the Applicant is connected by stock ownership, or otherwise, with any industry to be served by the line proposed to be constructed, acquired, or operated. If so, state the facts.

A-4. Yes, extension is to be constructed to serve a new mining operation of The Cleveland-Cliffs Iron Company and prospective mining operations of the Cleveland-Cliffs Iron Company and others.

Q-5. The chief uses and purposes of the proposed line or operation.

A-5. Chief purposes of the proposed line are to transport iron ore from a new mining operation and prospective additional mining operations to the LS&I ore dock at Marquette, Michigan, for transporting by lake vessel to lower great lake ports.

Q-6. The classes of service to be performed, as passenger, freight, express, and switching.

A-6. Freight, principally iron ore, mine supplies, and incidental switching service will be performed.

Q-7. The kind of motive power to be used. If electric power, state source and estimated cost.

A-7. Steam locomotives.

Q-8. Whether the line proposed to be constructed, acquired, or operated would receive material revenue from the territory traversed, or serve any material public convenience and necessity of the local territory.

A-8. The proposed extension will receive material and important revenue from shipments of iron ore and inci-

dental freight from present new mining operation and from prospective mining operations in territory traversed and will serve materia! public convenience and necessity by serving such new and prospective operations.

—8—

[fol. 219] Q-9. The name, area, and population of each county in which the new line is to be constructed, or in which the line to be acquired or operated is located, and the name and population of each city, town, and village at which a station would be or is established, together with its distance from a designated initial point, with the source of information as to population.

A-9. The extension will be constructed entirely in Marquette County, Michigan, which has an area of 1870 square miles and a population of 47,144 in 1940 according to the Geographical Publishing Company's Commercial and Library Atlas.

It is not contemplated to establish any station along this route.

Q-10. The names of places mentioned in paragraph 9 that are now served by common carrier railroads (excluding street railways), and the name of each such carrier serving the several places.

A-10. None.

Q-11. The names of the places mentioned in paragraph 9 that have no common carrier railroad service, the distance in miles of each such place from the nearest station on a common carrier railroad, the name of each such railroad and the character of the connecting highway.

A-11. None. This extension is only to serve a new iron ore mine now being developed.

Q-12. The name and population of each city, town, and village (together with state and county in which located), within the area to be served but not on the proposed route.

A-12. It is not contemplated that any present city, town or village will be served by this extension, no present city, town or village being along the route thereof. The village of Republic, Marquette County, population 2317, is in the general area.

Q-13. The approximate distance in miles by highway from the nearest station on the line to be constructed or acquired to each of the places mentioned in paragraph 12,

and the names of all common carrier railroads that now serve each of the places.

A-13. There are no stations contemplated on proposed extension.

—9—

[fol. 220] Q-14. The names of common carrier railroads with which the line would connect, and the proposed points of track connection.

A-14. None, other than the connection with the Applicant.

Q-15. The number of common carrier truck and bus lines operating in the area to be traversed by the line, and the character of service performed by each.

A-15. Three (3) common carrier freight truck lines.

One (1) common carrier passenger bus line.

They have no existing nor potential relation to purpose of this proposed extension, the transportation of iron ore.

Q-16. The general character of the country which the line would serve. Indicate whether it is level, rolling, mountainous, cultivated, pasture, prairie, desert, rocky, or timbered, etc.

A-16. Rolling, rocky, swampy, light timbered area.

Q-17. The approximate area of the territory to be served by the line, an estimate of the population therein, and the area.

(1) in timber
(2) in pasture, and
(3) under cultivation.
(See General Instructions)

A-17. No general area service contemplated, extension being proposed for service to new and prospective iron ore mining operations. Necessary physical location for such service does not lend itself to extended general service. Sparsely settled area, sparsely timbered with second growth timber except for a few isolated small gardens and small pasture areas.

Q-18. The kinds of industry carried on in the area to be served, such, for example, as farming, dairying, grazing, coal mining, manufacturing, lumbering, etc., and the relative importance of each.

A-18. Iron ore production will be substantially the only industry available to this extension. Some pulpwood and mining timber production possible.

—10—

[fol. 221] Q-19. The main facts as to the age, growth, extent of such industries, their probable future growth and permanence and the reasons therefor.

A-19. New ore mines are being developed in the area along this route the life of which should be not less than fifty years based on information received from the company to be served.

Q-20. What carriers now serve these industries, and to what extent.

A-20. None.

Q-21. Whether the chief support of the line to be constructed or acquired would come from the general community or from some particular industry or industries, located or to be located. In the latter case, give facts concerning such particular industry or industries and applicant's contractual or financial relation thereto.

A-21. The entire support will come from the Iron ore mines now being and to be developed along its route. See answers to questions No. 4 and 3.

Q-22. Whether the proposed line of railroad would be built, acquired, or operated primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business would be so benefited, what such advantages would be, and the applicant's contractual or financial relation to said industry.

A-22. It is to be built for direct profit from railway operation from the transportation of iron ore.

Q-23. If the line is to be or is an extension of an existing railroad, or a branch, connecting track, or cutoff, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line.

A-23. The extension is to be directly profitable in itself in that it will originate a large tonnage of iron ore otherwise not obtainable. It will also increase tonnage over existing line due to the line haul over the existing line of the Applicant.

[fol. 222] Q-24. If the line is to be a connecting link between existing railroads, the kind and volume of traffic, expressed in tons or carloads, that probably would be interchanged, and the economies that would be effected by such interchange.

A-24. It is not a connecting link between existing railroads.

Q-25. Of the interchange traffic mentioned in answer to paragraph 24, what part, expressed in tons or carloads, cannot be hauled or moved by existing railroads or truck lines.

A-25. Not applicable. See A-24.

Q-26. The facts concerning any agreement, tentative or otherwise, with existing carriers, covering operation, interchange of traffic, division of rates, or trackage rights, in connection with the line.

A-26. There are no agreements, tentative or otherwise, involving division of rates, nor any agreements concerning operation, interchange of traffic or trackage rights with existing carriers.

Q-27. Whether any aid, gift, grant of right-of-way, or other donation has been promised in connection with the proposed new line of railroad; if so, state specifically the nature, amount, and value of such promised donations.

A-27. None.

Q-28. The manner in which it is proposed to finance construction and equipment or acquisition, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities would be underwritten by industries to be served by the proposed line.

A-28. Construction will be financed out of available funds. No securities will be issued.

Q-29. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years of operation, together with an estimate of the annual gross revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per

unit, and the revenue to be derived, also chief points or territories of origin and destination.

—12—

[fol. 223] A-29. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years of operation, is set forth in Exhibit "H" attached hereto. It is estimated the average annual gross revenues expected after the first five years will be at least $500,000 with prospective additional revenue by reason of other iron ore deposits along this route and further iron ore operations contemplated.

Q-30. The estimated gross revenue, operating expenses, net revenue, and net railway operating income, corresponding with the estimates of traffic under paragraph 29. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

A-30. The estimated gross revenue, operating expenses, net revenue, and net railway operating income for each of the first five years, corresponding with estimate of traffic under paragraph 29, and based upon present costs, are set forth in Exhibit "I" attached hereto.

Q-31. The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

A-31. All of the estimated traffic is net additional business developed or created by the construction of the proposed extension and no part thereof will be diverted from existing railroads.

Q-32. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

A-32. The proposed new extension will be completed within 12 months after authority for construction has been issued if materials are available.

[fol. 224]

This report will not be printed in full in the permanent series of Interstate Commerce Comission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 16129

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
CONSTRUCTION

Submitted September 1, 1948. Decided September 8, 1948.

Certificate issued authorizing construction and operation by the Lake Superior & Ishpeming Railroad Company of an extension of a branch line of railroad in Marquette County, Mich.

A. Syverson for applicant.

REPORT OF THE COMMISSION

Division 4, Commissioners Mahaffie, Rogers, and Barnard

By Division 4:

The Lake Superior & Ishpeming Railroad Company on May 28, 1948, applied for authority to construct and operate an extension to its North Lake Branch from the end thereof, about 6.5 miles west of the station at Ishpeming to a point in Section 8, T-46-N, R-29-W near the village of Republic, approximately 14.3 miles, all in Marquette County, Mich. No representations have been made by any State authority, and no objection to the granting of the application has been presented.

The applicant owns and operates in interstate commerce a steam-operated railroad along the south shore of Lake Superior on the northern Michigan peninsula. One of the laterals of which the North Lake Branch is a part begins at the lake-front ore docks north of Marquette and runs in a general westerly direction to a point about 6.5 miles beyond the depot at Ishpeming. The sparsely settled

area which is not served by any other railroad is covered with second-growth timber. The purpose of the proposed extension is to provide rail service to a new iron ore mining operation and to prospective developments which are expected to furnish traffic for about 50 years. These mining properties are owned by the Cleveland-Cliffs Iron Company which also controls the applicant through direct ownership of 75.245 percent of the outstanding capital stock. There will be no stations on the line, but Republic with a population of about 2,317 will be about a mile from the end thereof.

[fol. 225]. The line is to be single-track, standard-gage construction laid with 80-pound rail and will have maximum grades of 1.0 percent eastbound and 1.4 percent westbound without compensation for curvature. The maximum rate of curvature will be 6° and averages 4° 51′ per mile. There will be 2 wooden trestles of permanent construction each about 50 feet long and containing 5 bents. Operations will be confined to freight service and there will be no physical connections with any other railroad.

The estimated cost of construction is shown to be about $900,000, of which $244,600 represents grading; $50,000, bridges and culverts; $156,000, ties; $123,000, rail, $54,900, other track material; $81,500 track laying and surfacing; $40,000 for ballast and the balance will be chargeable to accounts 1, 2, 15, 17, 18, 19, 27, and 36. No additional equipment will be required at least during the first 5 years of operation. It is expected that the project will be completed within 12 months after the certificate herein is granted. Construction costs will be financed out of available funds. The applicant's income account for each year 1943-1947 and the first 3 months of 1948, in order, shows balance of income transferred to earned surplus of $141,282, $153,144, $349,069, $31,665, $497,417, and $270,967 (deficit), while the unappropriated credit balance in earned surplus account as of March 31, 1948, was $2,512,356.

In addition to handling a total of about 500 carloads of machinery and supplies during 1949 and 1950, the applicant estimates that shipments of iron ore concentrates will be about 50,000 gross tons during that period, increasing by the same amount each year through 1952 and reaching

250,000 tons in 1953. It is expected that shipments will total 1,000,000 tons annually by the end of ten years. The financial results of handling this traffic for each year 1949-1953, in order, are expected to be as follows: gross revenues $17,400, $49,000, $75,800, $113,300, $188,300; operating expenses, $12,200, $36,800, $56,900, $79,300, $131,800; net revenues from railway operations $5,200, $12,300, $18,800, $34,000, $56,500; net railway operating income $1,400, $4,400, $8,000, $14,400, and $26,400.

The proposed construction will provide an outlet for iron ore from an area which is dependent upon rail transportation for its development. The prospective traffic warrants the construction proposed.

We find that the present and future public convenience and necessity requiring construction and operation by the Lake Superior & Ishpeming Railroad Company of the extension of the branch line of railroad in Marquette County, Mich., described herein. An appropriate certificate will be issued, which will provide that construction shall commence on or before October 15, 1948, and be completed on or before October 15, 1949.

COMMISSIONER BARNARD did not participate in the disposition of this proceeding.

[fol. 226]

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 8th day of September, A. D. 1948.

Finance Docket No. 16129

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY
CONSTRUCTION

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its

findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require construction and operation by the Lake Superior & Ishpeming Railroad Company of the extension of the branch line of railroad in Marquette County, Mich., described in the report aforesaid: *Provided, however,* and this certificate is issued upon the express condition that such construction shall be commenced on or before October 15, 1948, and shall be completed on or before October 15, 1949.

It is ordered, That the Lake Superior & Ishpeming Railroad Company shall report to this Commission in writing the commencement and completion of construction of said line of railroad within 15 days after such commencement and completion, respectively.

It is further ordered, That the Lake Superior & Ishpeming Railroad Company, when filing schedules establishing rates and charges applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered, That the Lake Superior & Ishpeming Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

W. P. BARTEL,
Secretary.

(SEAL)

EXHIBIT "H"

LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY

Detailed estimate of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering the first five (5) years of operation of proposed Extension to East Branch.

Periods	Carload Traffic	Net Tons	LS&I RR rate per net ton	Point of origin, Michigan	Point of destination (as interchanged with C/L)	Mean haul (Miles)	LS&I RR Gross Revenue
Annually	Saw Logs	22,500	$ 1.32	Various loading	Ishpeming, Mich. for beyond	102.6	$ 27,745.00
1956	Saw Logs	18,000	1.20	Spurs along the	Marquette, Mich. Line	80.8	21,600.00
to	Saw Logs	40,500	1.78	route	Little Lake, Mich. for beyond	67.8	72,090.00
1960	Saw Logs	22,500	1.12	"	Eben Jct.,Mich. for beyond	49.5	25,200.00
Inclusive	Chemical Wood	25,500	1.34	"	Little Lake, Mich. for beyond	67.8	34,176.00
	Chemical Wood	25,500	1.05	"	Marquette Line	80.8	26,778.00
	Pulpwood	14,000	1.16	"	Little Lake, Mich. for beyond	67.8	16,240.00
		168,500					$ 223,829.00
	Saw Logs	22,500	1.32	"	Ishpeming, Mich. for beyond	102.6	$ 27,745.00
	Saw Logs	18,000	1.20	"	Marquette, Mich. Line	80.8	21,600.00
Year	Saw Logs	40,500	1.78	"	Little Lake, Mich. for beyond	67.8	72,090.00
1961	Saw Logs	22,500	1.12	"	Eben Jct.,Mich. for beyond	49.5	25,200.00
	Chemical Wood	25,500	1.34	"	Little Lake, Mich. for beyond	67.8	34,176.00
	Chemical Wood	25,500	1.05	"	Marquette Line	80.8	26,778.00
	Pulpwood	14,000	1.16	"	Little Lake, Mich. for beyond	67.8	16,240.00
		168,500					$ 223,829.00
	Saw Logs	10,809	$ 1.32	"	Ishpeming, Mich. for beyond	102.6	$ 14,268.00
	Saw Logs	8,352	1.20	"	Marquette, Mich. Line	80.8	10,022.00
	Saw Logs	19,161	1.78	"	Little Lake, Mich. for beyond	67.8	34,107.00
Annually	Saw Logs	10,809	1.12	"	Eben Jct., Mich. for beyond	49.5	12,106.00
Thereafter	Chemical Wood	14,577	1.34	"	Little Lake, Mich. for beyond	67.8	19,533.00
	Chemical Wood	14,578	1.05	"	Marquette, Mich. Line	80.8	15,307.00
	Pulpwood	8,400	1.16	"	Little Lake, Mich. for beyond	67.8	9,744.00
		86,686					$ 115,087.00

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[fol. 228] Q. Is that known as the White Rat grade?

A. Yes.

Q. To what railroad was that White Rat grade connected?

A. I can't answer that question. I don't know where it hooked on at the west end. I know it went to the west, I am quite sure. Just where it hooked onto another railroad, I can't tell you.

Q. Is it possible that it may have connected with a grade which ran along what is now the Adams Trail?

A. Well, it may have. The Adams Trail, through a portion of its location here, is located on the old railroad grade.

Q. Yes.

To your knowledge, were any of these railroad grades connected to the Lake Superior & Ishpeming?

A. Not to my knowledge.

Q. There are listed in Exhibit H to applicant's return to questionnaire, certain destination points. Are you in a position to advise what the ultimate destination is with respect to those points where it is listed as a movement going to a certain point for beyond, in the sixth column from the left? In other words, the first line of the exhibit shows 22,500 tons of saw logs destined for Ishpeming, Michigan, for beyond.

A. Yes.

Q. What is the ultimate destination of those shipments?

A. Well, the only way I can answer that question is to

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[fol. 229] state where the logs that we are shipping at the present time beyond Ishpeming are going.

Q. Can you do that, sir?

A. Yes, those logs are going to Baraga, Michigan, and Chassell, Michigan.

Q. And what are the purchasing industries at those locations?

A. They are saw mills.

Q. Do you know the names of the mills?

A. Yes, the North Woods Timber Company at Baraga, and the Chassell Lumber Company at Chassell.

Q. What industry will use the saw logs destined for the Marquette, Michigan, destination?

A. Well, the Cliffs-Dow Chemical Company; Schneider Brothers Lumber Company—there are several other saw mills in Marquette that possibly could purchase these logs.

Q. But at the present time you don't have any movement to those mills?

A. That is right, yes.

Q. With respect to the movement of saw logs destined to Little Lake, Michigan, for beyond, what is the ultimate destination of those logs, and what are the consuming industry or industries?

A. The Kingsford Chemical Company, at Iron Mountain —That is the principal one.

Q. Do you have a movement to Amasa, Michigan?

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[fol. 230] A. Amasa, yes.

Q. Do you expect that to continue?

A. No.

Q. With respect to the movement of saw logs to Eben Junction, Michigan, for beyond, what is the ultimate consumer of that?

A. The Goodman Lumber Company at Goodman, Wisconsin; the John Kadlets Lumber Company at Shawano, Wisconsin; the Himes Lumber Company at Crandon, Wisconsin.

That is all there.

Q. With respect to the movement of chemical wood to Little Lake, Michigan, for beyond, is that also for Kingsford?

A. Yes.

Q. With respect to the movement of chemical wood for Marquette, what is the consuming industry?

A. The Cliffs-Dow Chemical Company.

Q. With respect to the movement of pulpwood from Little Lake, Michigan, what is or are the consumer industries?

A. The Marathon Corporation at Rothschild, Wisconsin.

Q. That is all?

A. Yes.

Q. With respect to the movement after the year 1961, do you contemplate shipping reduced amounts of forest products to the same consuming industries in about the same proportion?

A. Yes, as far as we know now.

Q. Are you familiar with the loading operations at Spur 81?

—114—

[fol. 231] office for a period of 17 years winding up in 1929. Then I spent 17 years with the Duluth, South Shore & Atlantic Railway in various capacities in the traffic department as chief clerk, general agent, assistant general freight agent, and general freight agent.

Q. Is the document which has been marked as Exhibit H and attached to the application one which was prepared by you or under your direction?

A. It was prepared under my direction.

Q. Is it true and correct to the best of your knowledge and belief?

A. To the best of my knowledge and ability, it is correct.

Q. Mr. Smith, I wish that you would explain to the Examiner just what these figures are intended to reflect, and how you arrived at them.

A. From a forecast of tonnage given to the Lake Superior & Ishpeming Railroad Company by the Cleveland Cliffs Iron Company we were able to allocate the revenue from saw logs, chemical wood, and also pulp wood in accordance with the Interstate Commerce Commission's request on a tonnage basis.

Q. In other words, you took the tonnages which the Cleveland Cliffs Iron Company furnished to you?

A. That is right.

Q. And you rated them in order to determine what the revenues to the LS&I would be, is that correct?

—118—

[fol. 232] What do you estimate to be the through rate that will be placed in effect between the end of the proposed extension and—well, to cover the points which are beyond Ishpeming, the Goodell Lumber Company at Chassell?

A. I haven't projected any rates to Chassell.

Q. Have you projected any rates to Baraga?

A. Yes.

Q. What is the rate you have projected to Baraga?

A. 14 cents per hundred.

Q. 14 cents per hundred?

A. Yes.

Q. That would be $2.80 a ton, is that right?

A. That is right.

Q. Of which the LS&I would receive a proportion of $1.32. What is the connection, the connecting line? What is the connecting line to Baraga?

A. The Duluth South Shore, & Atlantic Railway.

Q. Their proportion would be the remainder of that rate, or $1.48, is that right?

A. That is right.

Q. There has been testimony in the record to the effect that saw logs destined for beyond Little Lake, Michigan, will in large part go to Iron Mountain, Michigan. What is the through rate to Iron Mountain under the proposed terms of the extension?

—119—

[fol. 233] A. 14 cents per hundredweight.

Q. That would again be $2.80 per ton, is that right?

A. Yes.

Q. Since we are talking in terms of per ton.

A. Yes.

Q. What is the connecting railroad?

A. Iron Mountain would connect at Little Lake with the Chicago & Northwestern.

Q. That would be the C&NW.

Would the C&NW get the remainder of $1.02?

A. That is right.

Q. Have you projected rates to other destinations through your connection with the C&NW at Little Lake, or were you concerned primarily with the Iron Mountain rate?

A. I have not projected any rates.

Q. Your estimates of what the rates would be?

A. That is right. You—

Q. You have not estimated—

A. I have not been approached.

Q. What were your estimated rates for destinations beyond Eben Junction?

A. To what point?

Q. Well, what points were you considering?

A. Goodman, Wisconsin.

Q. What is the rate to Goodman?

—120—

[fol. 234] A. 11 cents per 100.

Q. That would be $2.20 per ton, is that right?

A. That is right.

Q. You show the LS&I proportion of $1.12 a ton, which would leave the Soo Line—I assume it is the Soo Line—$1.08 a ton, is that right?

A. What did you say, $2.20?

Q. $2.20.

A. $1.08.

Q. $1.08, the Soo Line proportion?

A. Yes.

Q. With respect to the chemical wood moving to Little Lake, Michigan, for beyond, I assume you projected a rate to Iron Mountain in connection with the C&NW, is that correct?

A. Yes.

Q. And what is that rate?

A. 12 cents per hundred.

Q. Or $2.40 per ton?

A. Yes.

Q. And the C&NW proportion on that would be $1.06 per ton, is that right?

A. Right.

Q. What destinations did you project rates to on pulp wood through Little Lake?

A. Well, the point picked was Kimberly, Wisconsin.

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[fol. 235] Q. What was the through rate to Kimberly?

A. 14 cents per hundredweight.

Q. That is $2.80 per ton, of which $1.16 goes to the LS&I, and the remainder, or $1.64, goes to the C&NW, is that right?

A. Yes.

Q. We note that the mean haul to Ishpeming, Michigan, upon which you estimate a division to the LS&I of $1.32 per ton is somewhere in the neighborhood of 60 percent larger than the mean haul on the LS&I to Little Lake, Michigan, where you have a rate of $1.78 per ton.

How do you explain the high rate for Little Lake—the high division?

A. That is something that is a matter of divisions between the traffic departments. It would be kind of hard for us to reconcile that other than to say—I will put it like this: We intend to allow the DSS&A the same revenue as they obtain

today out of the rate from Cusino, I believe it is, or Camp 15. For the service that is performed over the two lines, the level of the rate measures out very well with the rates that move to Iron Mountain in connection with the C&NW for almost identical distances. So they fall into, in our rate-making patterns, the same levels.

Q. Do you have any idea of the number of miles that fall on the Northwestern between Little Lake and Iron Mountain?

A. I haven't got the information right in front of me,

[fol. 236] but I could find it out.

Q. Would about 90 miles be a reasonable guess?

We will cover that in our own examination, so I move to strike the question.

How do the rates which you have proposed to Marquette compare with the present rates between Cusino and Marquette?

A. They would be the same. Cusino would be intermediate. Do you mean from Marquette?

Q. Between Cusino and Marquette you have rates published now I assume covering these commodities?

A. Now, where are we coming from, the branch?

Q. Now we are coming from the end of the branch.

What are the differences between the rates from the end of the branch to Marquette, than from Cusino to Marquette?

A. Our proposal would be there would be no change.

Q. You would have the same rate from the end of the branch as you presently have from Cusino?

A. Yes.

Q. Do you presently have in effect rates covering the movement of ten cars or more of saw logs and chemical wood with not less than 100,000 pounds per car between Cusino and Marquette?

A. Not on chemical wood.

Q. Do you on saw logs?

A. Yes.

Q. What are those rates?

[fol. 237] [Handwritten notation—Filed 7/30/56]

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EXCERPTS FROM APPLICANT'S REPLY TO EXCEPTIONS, ETC.

Intervener's Exception XV

Effect of Control of Applicant by Cleveland-Cliffs

At this point intervener objects to the Examiner's finding that the benefits which Cleveland-Cliffs would obtain from the construction of the extension will be contrary to the public interest because of its relationship to the applicant. Intervener contends that this relationship *ipso facto* condemns the proposed extension as contrary to the public interest, argues the point at pages 10 and 11 of its exceptions and cites in support of its proposition: *Construction of Line by Jefferson Southwestern*, 86 I.C.C. 796; *Construction by Perry and Southeastern Railway*, 124 I.C.C. 341; *Elizabeth Southern Railway Proposed Construction*, 166 I.C.C. 105; and *Arkansas, Louisiana and Missouri Railway Company Construction*, 290 I.C.C. 1.

Intervener omits to cite, however, the report on rehearing of the last and latest of the foregoing cases—the *Arkansas L. & M.* case—in which the previous decision was reversed (290 I.C.C. 112). The latter report demonstrates the infirmity of intervener's position and that there is nothing inherently wrong in an extension by a railroad to meet the shipping needs of its principal owner and accordingly such a circumstance does not necessarily condemn the project as inimical to the public interest.

An examination of the cases will reveal that the governing factors which impelled the decisions are entirely lacking in the instant case and a review of the instant record will satisfy that the Examiner was entirely correct in holding that there is no indication, in fact no apparent likelihood that the service benefits and economies which would accrue to Cleveland-Cliffs would be in any way contrary to the public interest because of its relationship to the applicant.

[fol. 238]

—19—

As appears clearly by the language quoted by intervener (I. Exc. 10-11) from the earliest case cited—the *Jefferson*

Southwestern case—the circumstance apprehended by the Commission was that where a short line connecting with more than one trunk line was in position to play one against the other through the routing of traffic and thus obtain concessions in divisions, car supply, etc., the door might be open to abuses resulting in unjust preference of the controlling industry. The same consideration affected and seems to have induced the decision in the *Perry & Southeastern* case and the *first decision* in the *Arkansas, L. & M.* case. In the *Elizabeth Southern* case there was ownership and control by the shipper principally to be served but that factor does not appear to have been material to the decision or to have been considered particularly as an inducement thereof.

In this case the Examiner is correct in his conclusion that the benefits to Cleveland-Cliffs were not shown by the record to be inconsistent with the public interest nor attendant upon the possibility or likelihood of the abuses which the Commission noted in these earlier cases. Here the involved traffic is all outbound and in no material degree subject to the competition of connecting lines for its routing. All of the anticipated traffic will go to destinations on the applicant's own line except as follows: (See Exhibit H; R. 60-61, 118-121)

To Baraga and Chassell, Mich., local points on the line of intervener, 22,500 tons of saw logs to be transferred to that railroad at Ishpeming;

To Iron Mountain, Mich., a local point on the Chicago & North Western, 40,500 tons of saw logs and 22,500 tons of chemical wood to be interchanged to that railroad at Little Lake, Mich.;

[fol. 239]

—20—

To Goodman, Shawano and Crandon, Wis., 22,500 tons of saw logs to be transferred to the Soo Line at Eben Junction, Mich. Goodman and Crandon are local points on the Soo Line; Shawano is served by the Soo Line and the North Western.

To Rothschild, Wis., 14,000 tons of pulpwood to be transferred to the North Western at Little Lake. Rothschild is

served by the North Western and the Milwaukee but applicant has no direct connection with the latter railroad.

It will be seen from the above that the nature of the traffic does not lend itself to the abuses noted by the Commission.

Commencing at page 12 of its Exceptions Brief, intervener argues that it is able to furnish the transportation service from the area involved more economically than is the applicant and it predicates this argument upon a comparison of its rates with the rates which have been suggested by the applicant and upon which it based its estimates of revenue. For example, it points out that the applicant's rate to Baraga is contemplated at $2.80 per ton as compared with intervener's single line rate from Spur 81 of $1.60. It points out further that the rate to Iron Mountain will be unduly higher than the applicant's present rate from Cusino.

With respect to the relationship of rates now applicable from Cusino, applicant's traffic manager testified that there were certain rates from the latter point which were depressed and he recognized that some adjustment would have to be made in order to maintain appropriate relationships. It may well be that the same result would follow with respect to relationships with the rates maintained by the intervener from Spur 81. The projected rates were based on a formula adopted by

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[fol. 240]

EXCERPTS FROM REPORT AND ORDER OF THE COMMISSION, ETC.

F.D. No. 19084—Sheet 6

Intervener contends that the application should be denied because, in the event it is approved, applicant as a controlled subsidiary of Cleveland-Cliffs will become the originating carrier of the most important shipper from the involved area. A review of the cases cited by the intervener in support of this contention shows that the governing factors which impelled the decisions are lacking in the instant case. The record in this case does not justify the conclusion that any benefits Cleveland-Cliffs may obtain from the proposed construction would result in the abuses noted in such cases. All of the involved traffic will be outbound and in no material degree subject to the competition

of connecting lines for its routing. A very substantial amount of it will go to destinations on applicant's own line.

The applicant estimates that, if the traffic to be originated on the proposed extension amounted to no more than that projected by Cleveland-Cliffs, it would increase net railway operating income of the applicant annually by $86,050 during the first 6 years of operation. Applicant estimates that at present freight rate, extended at a normal rate of projection, this traffic would yield net to it freight revenues of $223,830 per year. (Since the hearing the rates on interstate traffic have been increased by 6 percent by General Rate Increase Tariff X-196-A, effective March 7, 1956.

Here the total out-of-pocket expenses as computed by the applicant for operation of the line amount to $75,640, which, deducted from these estimated gross revenues leaves net revenue from railway operation of $148,190. After deduction of $3,400 for payroll taxes and $5,000 for ad valorem tax, this revenue becomes $139,790.

In addition, applicant estimates that it will receive from connecting lines $39,480 as per diem on its flat cars, making a total net income of $179,270 before Federal income taxes, estimated at $93,220, leaving net railway operating income of $86,050.

[Handwritten notation—Filed 1-28-57]

—2—

EXCERPTS FROM APPLICANT'S REPLY TO INTERVENER'S PETITION, ETC.

[fol. 241] 3. Finally, petitioner charges that the public interest in maintaining a competitive national transportation system would be subverted by "effectively eliminating petitioner as a competitor for transportation of forest products from the area under consideraiton" (P. 2).

I

It will be noted that the only "abuse" involved in the LS&I-Cliffs relationship which has been charged by the intervener as affected by the proposed construction is the receipt of dividends to Cliffs which would be enhanced by the net income produced by the prospective traffic. There

is not the slightest indication in the reports of either of the cases relied upon by the intervener that the Commission considered the payment of dividends to a majority stockholder as an "abuse" or as a "virtual" or "indirect" rebate whereby the provision of transportation service to such stockholder would be furnished "at a net cost less than the tariff rates" and that the "integrity of the published tariff rates" would thereby be impaired.

In the *Jefferson Southwestern* case the Commission was dealing with a proposal to extend to the plant of the parent industry a short-line railroad. What the Commission pointed out and emphasized in that case was that the control of a short line by an industry furnishing a large volume of traffic "opens the door to grave abuse, particularly when the short line connects with more than one trunk-line railroad", since "by playing one connection against the other they have frequently been able to gain concessions in divisions, or in car supply, or in other matters which have, in practical effect, amounted to a preference of, or rebate to, the controlling or affiliated industry". This is the only reference to "rebates" which the Commission made in its report. It did note in its original report (76 I.C.C.

—3—

[fol. 242] 776, 782) that the promoters had already entered into negotiations with the connecting trunk lines for the other preferences described. It was the advantage of such a position that the Commission referred to as subject to abuse and upon which it found.

In the *Jefferson Southwestern* case the Commission had much to say with respect to the evils against which the commodities clause was aimed, and held that it should not grant a certificate "for the construction of a railroad whose operation, it seems reasonable to believe, may prove to be in violation of that clause". That case was decided in 1924 long prior to the decision of 1936 in *United States* v. *Elgin, Joliet & Eastern Railway Co.*, 298 U.S. 492, 80 L.Ed. 1300, wherein the Supreme Court held the commodities clause not to apply to the transportation of the property of a parent industry so long as the management of the railroad corporation, regardless of the stock ownership, is kept independent of that of the industry, or vice versa, and not made subject to undue control of interference, one with the other.

There is not a syllable in this record to indicate anything but complete independence of the management of the LS&I

from that of Cliffs and what is equally or more in point is the fact that the commodities clause itself specifically excludes from its operation the carriage of timber and its products which comprises all of the traffic involved here. See also the *Tapline* cases, *United States* v. *Louisiana & Pacific R. Co.*, 234 U.S. 1, 58 L.Ed. 1185; *United States* v. *Butler County R. Co.*, 234 U.S. 29, 58 L.Ed. 1196.

The argument that dividends constitute a rebate to a stockholding shipper seems to us so farfetched, extreme, and unrealistic as to require no further comment. If such

—4—

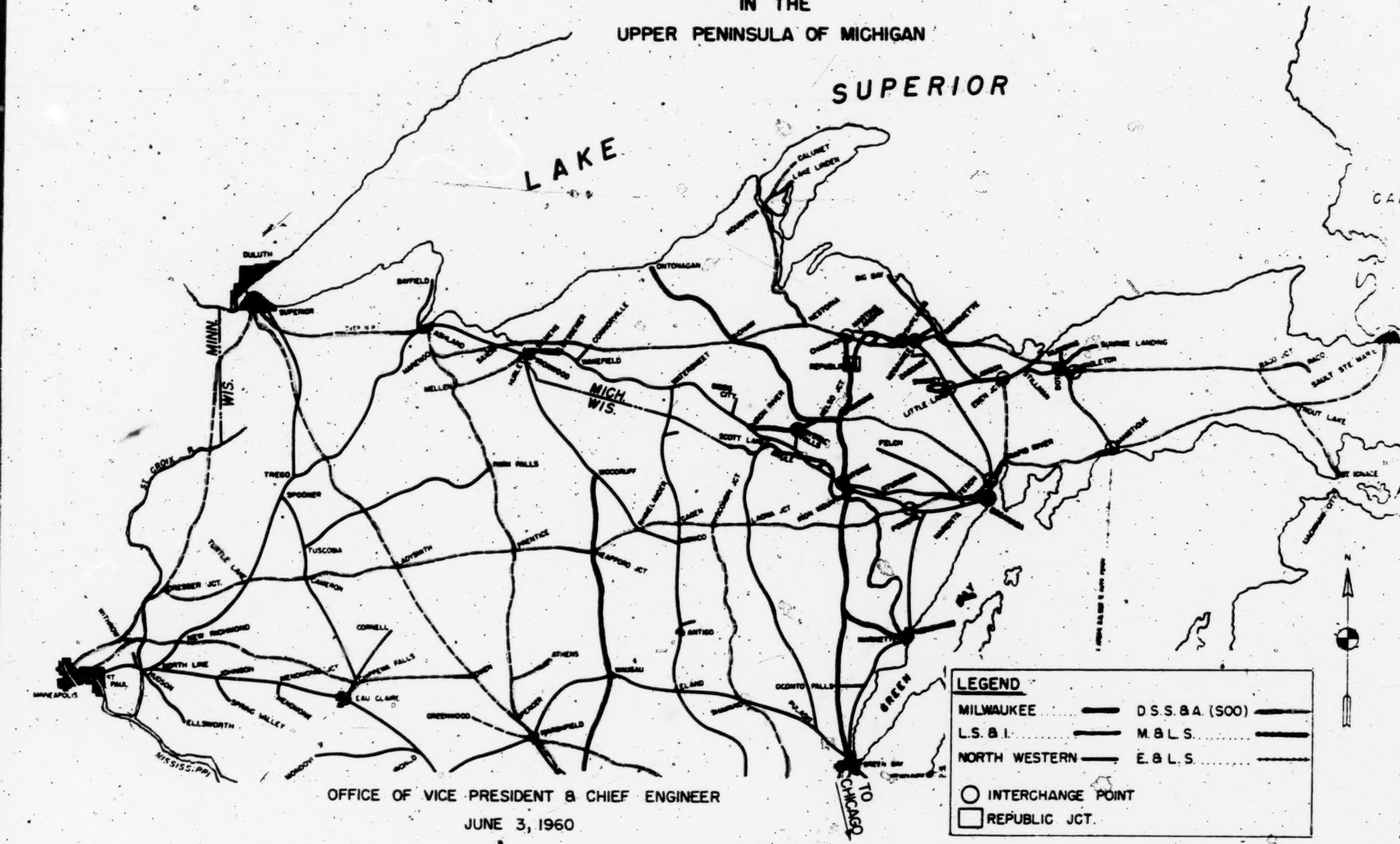
[fol. 243] an argument were valid it would condemn, in principle at least, all dividends paid by railroads to any of their shippers regardless of the amount of stock which might be held by each. The necessary implications of the *Tapline* cases and the *E.J.&E.* case, *supra*, are entirely inconsistent with such a view.

In the other case relied upon by intervener, the *Arkansas, Louisiana & Missouri Railway Co.* case, 290 I.C.C. 1, the Commission was dealing with a proposed extension of the railroad to a proposed plant of the parent industry. The proposed extension would be wholly duplicative of existing facilities and for the sole purpose of providing competitive services by two railroads rather than by one. The Commission found that the service and facilities of two railroads were not required for reasonably adequate service and that the industry was using its control "in a manner inimical to the best interests of the national transportation system" and accordingly denied the application. The governing facts and circumstances in the instant case are not only distinguishable, they are entirely different. Neither the factual situation nor the principle applied in either of these cases is applicable here, and Division 4 properly so pointed out since in connection with the instant application the involved traffic is all outbound and in no material degree subject to the competition of connecting lines for its routing.

This case has been briefed twice and orally argued before the Division. In its brief on exceptions and at the oral argument, intervener cited at some length and quoted the language, on which it so strongly relies, which is excerpted from the *Jefferson Southwestern* case. In that circumstance to say that the Division did not understand the holding and

C. & N. W. RY. CO.

RAILROAD AND INTERCHANGE POINTS IN THE UPPER PENINSULA OF MICHIGAN



OFFICE OF VICE PRESIDENT & CHIEF ENGINEER

JUNE 3, 1960

[fol. 245]

EXHIBIT 12

(See opposite) ☞

LAKE SUPERIOR & ISHPEMING R

Summary of traffic interchanged wi
Western Railway at Little Lake, Mi
periods from November 1956 to July
November 1957 to July 1958 inclusi
interchanged with the CMStP&P RR a
the Latter period.

Traffic Received by LS&I RR	Ju
Chemical Wood	
L.P.Gas and Gasoline	
Fuel Oil	
Machinery	
Steel and Steel Products	
Wood Pulp	
Oxygen	
Coal	
Latex, Soda, Chlorine	
Paper, Cartons, etc.	
Pulpwood	
Merchandise cars	
Miscellaneous	
Total Received Traffic	1

Traffic Forwarded by LS&I RR	
Merchandise cars	
Machinery	
Charcoal	
Paper	
Pulpwood	
Wood Pulp	
Sawdust	
Lumber	
Iron Ore	1
Miscellaneous	
Total all Traffic Except Saw	

AILROAD COMPANY

th the Chicago and North
chigan during each of the
1957 inclusive and from
ve as compared with traffic
t Republic Junction during

C&NW Ry. Period Ended July 1957	C&NW Ry. Period Ended July 1958	CMStP&P RR Period Ended July 1958
350	92	29
119	25	---
358	270	8
31	6	7
111	44	5
26	9	1
60	41	---
55	44	---
84	64	---
93	28	3
49	2	---
155	66	---
242	294	38
,733	985	91
	92	
	3	
88	22	---
23	14	7
207	187	127
352	286	16
288	160	---
67	193	---
55	23	25
112	32	15
,080	551	40
77	40	6

Traffic Received by LS&I RR	July
Chemical Wood	3
L.P.Gas and Gasoline	1
Fuel Oil	3
Machinery	
Steel and Steel Products	1
Wood Pulp	
Oxygen	
Coal	
Latex, Soda, Chlorine	
Paper, Cartons, etc.	
Pulpwood	
Merchandise cars	1
Miscellaneous	2
Total Received Traffic	1,7

Traffic Forwarded by LS&I RR	
Merchandise cars	
Machinery	
Charcoal	2
Paper	3
Pulpwood	2
Wood Pulp	
Sawdust	
Lumber	1
Iron Ore	1,0
Miscellaneous	
Total all Traffic Except Saw and Chemical Logs	2,3
Saw and Chemical Logs	3
Total Forwarded Traffic	2,7

New traffic from East Branch Exten

C&NW Ry. Period Ended July 1958	CMStP&P RR Period Ended July 1958
92	29
25	---
270	8
6	7
44	5
9	1
41	---
44	---
64	---
28	3
2	---
66	---
294	38
985	91
92	
93	
22	---
14	7
187	127
286	16
160	---
193	---
23	25
32	15
551	40
40	6
1,508	236
856	1,767 #
2,364	2,003

sion 1,708 cars

[fol. 246]

BEFORE THE INTERSTATE COMMERCE COMMISSION

[Stamp—Exceptions Must Be Filed With Commission and Copies Served So as to Reach All Parties or Their Attorneys Who Appeared at the Hearing or on Brief on or Before Jan 19 1959]

Finance Docket No. 20048[1]

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.

Decided .....

Recommended that division 4 find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act, and order the defendants to terminate such violation.

(2) That the above-described violation of the act should be referred to the United States Attorney with request that prosecution be undertaken under the penal provisions of the act and jurisdiction of the proceeding retained.

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[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, et al.

(3) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of a connecting track and interchange tracks near Republic, Mich.

Henry S. Mitchell and *Thomas M. Beckley* for Duluth, South Shore and Atlantic Railroad Company.

R. K. Merrill, J. J. Naglé, L. S. Hamilton and *F. M. Long* for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Bernard H. Davidson and *Philip H. Porter* for Lake Superior & Ishpeming Railroad Company.

C. H. Dickman and *Edgar Vanneman, Jr.* for Chicago and North Western Railway Company.

REPORT PROPOSED BY JOHN L. BRADFORD, HEARING EXAMINER

On January 8, 1958, the Duluth, South Shore and Atlantic Railroad Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, hereinafter referred to as complainant or Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to Part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as Milwaukee and Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich., in violation of the provi- [fol. 247] sions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation. In answers to the complaint filed February 13, 1958, by Milwaukee, and February 14, 1958, by Ishpeming, defendants admit that they have constructed and are operating the tracks specified in the complaint but contend that they are not violating the provisions of the act inasmuch as such tracks are "switching tracks" within the purview of the exemption provided in section 1(22). They also stated

that if there is any doubt about the matter they would file an application for appropriate authority. Such application under section 1(18) was filed on March 27, 1958, and a supplemental application under section 5(2) was filed on August 1, 1958. On April 9, 1958, applicants filed a motion to dismiss their application under section 1, which motion was subsequently made applicable to their application under section 5, on the ground that the tracks involved are "switching tracks" and therefore excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, applications, and the motion for dismissal of the applications were assigned for hearing on a consolidated record and a hearing was held on September 5, 1958. The applications were amended at the hearing. Briefs have been filed. No representations have been made by State authorities. Complainant and the Chicago and North Western Railway Company hereinafter referred to as Northwestern have been permitted to intervene in the application cases. Unless otherwise specified all points mentioned herein are in Michigan.

Description of the project.—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wisc., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee [fol. 248] located in Michigan connected only at Champion with Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad, and at Iron Mountain with the line of the Northwestern extending between Escanaba and Ashland, Wisc.; and Ishpeming's line, so far as here material, connected at Marquette with Duluth's line, and at Little River with Northwestern's line extending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of 262 feet of crossover track between the main lines of the Milwaukee and Ishpeming of

which 148 feet are owned by the former and 114 feet by the latter; a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both turnouts are owned by the latter and 902 feet by the Milwaukee; and a track 1,746 feet in length parallel and adjacent to and turning out of the last described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs establishing through routes and joint rates on various commodities over their lines via this crossover track which are now in effect.

The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., Republic at 10:45 p.m. and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., Republic at 12:40 a.m. and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound [fol. 249] train is scheduled to arrive at the cross-over track, hereinafter called Republic Junction, at 10 a.m. and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown and the engine then moves backwards over the crossover track and

on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train, and proceeds to Channing. The Ishpeming's trains are operated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of section 1(18) and 5(2) and the complaint and applications here considered should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18) and the motion to dismiss the applications should be denied.

As heretofore stated, applicants contend that the tracks involved herein are switching tracks. They assert that the tracks are used merely to switch cars from one line to the other and that they are not used for the movement of trains. [fol. 250] In one sense they are right. The operation has all of the characteristics of a switching movement. But it is more than that. It is a means for obtaining traffic which, but for the connection, would move over other routes consisting of lines of other carriers. As stated by the United States Supreme Court in *Atlantic Coast Line* v. *Riverside Mills*, 219 U.S. 186, 198, "through this method (the making of through routes) a situation has been brought about by which though independently managed, connecting carriers become in effect one system".

Applicants cite a number of prior decisions by this Commission and by the courts in support of their contention that the tracks involved are merely "switching tracks". Practically all of the cases relied on, however, are either not in point or they have, in effect, been overruled in subsequent decisions. All of the cited cases decided by this Commission involve applications for trackage rights over existing lines and the facts definitely establish that only switching operations were involved. In *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F. 2d 126, the court refused to enjoin the construction of a track crossing the line of

the Missouri Pacific and directly connecting the lines of the Union Pacific and the Chicago Great Western which was in lieu of another connecting track between their lines which had been acquired by the Missouri Pacific and the connection broken. The court held that in these circumstances the new track was a "switching track," exempt from certificate requirements of the act by section 1(22). No appeal was taken from this decision and it became law of the case in proceedings before State courts, also relied upon by applicants. Those cases, however, should not be considered as controlling the decision here, because the facts involved are different. In those cases an existing connection was broken through action of the Missouri Pacific and the construction was for the purpose of reestablishing the connection. Here there was no connection between defendants lines until the one involved herein was built.

[fol. 251] The defendants attempt to distinguish a number of court cases holding that a certificate from this Commission authorizing the construction of tracks connecting two railroads is required before such tracks can be constructed on the ground that they involved the construction of a track which one or both railroads opposed. Applicants apparently concede that a certificate of public convenience and necessity must be obtained from this Commission before two railroads can be forced to provide a connecting track, but they contend that the certificate would be issued under the provisions of section 3(4) and section 15(3). There is no merit in this contention. Sections 3(4) and 15(3) do not provide for the issuance of certificates and the Commission cannot compel the construction of connecting tracks thereunder. The provisions of the act enabling the Commission to issue orders requiring the construction of connecting tracks are found in section 1(21). See *City of Milwaukee* v. *Chicago & N. W. Ry. Co.*, 283 I.C.C. 311. That section provides that "The Commission may * * * authorize or require by order any carrier by railroad subject to this part (Part I) * * * to extend its line or lines. But the provisions of section 1(22) are also applicable to the provisions of section 1(21). Accordingly, if a track connecting two railroads is merely a "switching track" the

Commission has no jurisdiction to require its construction. However, the courts, with the exception of *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co., supra,* and this Commission, have uniformly held that such connecting track constitutes an extension of line within the meaning of section 1(18)-(21) and not excepted from those provisions by the provisions of section 1(22). *Alabama & V. R. Co.* v. *Jackson & E. R. Co.,* 271 U.S. 244, *People* v. *Public Service Commission,* 233 N. Y. 113, *Pipestone* v. *Chicago M. & St. P. Ry. Co.,* 213 N.W. 534, *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 5 F. 2d. 777, *Charleston & W. C. Ry. Co. Construction,* 166 I.C.C. 707 and *Great Southwest Railroad Inc. et al. Construction, Etc.,* —— *I.C.C.* —— (not printed in full), decided June 3, 1958. In the circumstances the Com-[fol. 252] mission should find that the tracks involved herein constitute extensions of the lines of the defendants which lawfully cannot be constructed or operated without first obtaining an appropriate certificate from this Commission. Since defendants have admitted that they have constructed and are operating the tracks without obtaining such certificate, it follows that they are violating the provisions of section 1(18)-(22) and division 4 should so find, and order defendants to discontinue the violation. Division 4 should also refer this matter to the United States Attorney pursuant to section 12(1) of the act with a request that prosecution be undertaken under the penal provisions of the act.

Since the tracks have been built, it would serve no useful purpose to order their removal without first considering whether they are required by the present or future public convenience and necessity. As previously stated, the tracks were constructed in the fall of 1957, and operations thereover were instituted by the applicants on October 21 of that year. Between that date and June 30, 1958, applicants interchanged at Republic Junction, a total of 1,756 carload shipments of which 1,629 originated at points located on Ishpeming's line and terminated at points on Milwaukee's line; 50 originated on Ishpeming's line and terminated at points beyond Milwaukee's line; 51 originated on the Milwaukee and terminated on the Ishpeming; and 26 originated at points beyond the Milwaukee and terminated on the

Ishpeming. Of the 1,629 shipments originating on the Ishpeming and delivered on the Milwaukee, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. As seen these two commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of the traffic delivered by the Ishpeming to the Milwaukee.

Two shipper witnesses testified in support of the applications. A company engaged at Iron Mountain, in the manufacture and sale of hardwood lumber, juvenile furniture, and charcoal, buys about 90 per cent of its supply of saw logs for the manufacture of lumber and a much smaller percentage of its supply of chemical logs for the manufac- [fol. 253] ture of charcoal from the Cleveland Cliffs Iron Company. These logs are shipped at consignee's direction from Sunrise Landing on the Ishpeming's road, and the saw logs are moved under so-called manufacture and reshipping rates, Iron Mountain is served by the Northwestern and the Milwaukee and the plant of this shipper is located on the latter's road. A witness representing the shipper testified that it shipped lumber over both lines and accordingly, in order to receive the benefit of the manufacture and reshipping rates it was necessary to bring in its supply of saw logs over both lines. The routes available to the shipper for this purpose are (1) Ishpeming's road to Little Lake and the Northwestern's line to Antoine where shipments are delivered to the Milwaukee for reciprocal switching to the plant, and (2) Ishpeming's road to Republic Junction and Milwaukee's line to the plant. The latter route involves the lesser time in transit and the consignee is able to receive more definite information on the progress of its shipments. During the summer months, time in transit is important because lumber is subject to stain if manufactured much more than 10 days after the logs are cut. This manufacturer receives between 20 and 30 carloads of saw logs per week.

This company obtains its supply of chemical logs from several sources and more than 50 percent of its shipments are brought in by trucks. This commodity moves on a relatively low rate and routes involving more than a two-

line haul are prohibitive. The shipments of chemical logs do not move on transit rates but the shipper divides the traffic between the Milwaukee and the Northwestern as delivering carriers. Both roads have cars available to supplement Ishpeming's car supply when needed.

Another manufacturer of hardwood lumber located at Amasa on the line of the Milwaukee also utilizes applicant's services for the delivery of shipments of saw logs from Sunrise Landing. This shipper also moves its shipments under manufacture and reshipping rates and any other route from this origin would involve a three-line haul at a [fol. 254] rate which would be prohibitive. This company receives approximately 200 car-loads of logs per year from this source and it utilizes truck services from other sources to obtain more than one-half of its log supply. Its witness testified that his company would not be able to utilize Sunrise Landing as an origin point for saw logs if the route through Republic Junction is broken.

The Northwestern contends that it has been adversely affected by the establishment of the Milwaukee-Ishpeming connection and that a grant of the authority sought would merely aggravate this situation. It believes that the chemical and saw logs from Sunrise Landing now moving over the route through Republic Junction would be diverted to its line over the route through Little Lake in the event authority for the former route is not granted. Its witness testified concerning its service between Sunrise Landing and Iron Mountain via Little Lake and the revenues produced by the movement of logs over this route. The distance from Little Lake to Iron Mountain via the Northwestern's line is 92 miles and its scheduled service over this route provides for second morning deliveries. Its witness was aware of a few instances when actual service was somewhat slower than scheduled service. It also appears that the Northwestern's portions of revenues from the movement of minimum shipments of chemical logs and saw logs from Sunrise Landing to Iron Mountain are $35.00 and $51.30 per carload, respectively. These shipments generally move in cars owned by the Ishpeming, and in such instances the Northwestern is required to pay, out of its

portion of the revenue (1) per diem charges for cars while they are on its line, (2) a switching charge to the Milwaukee amounting to $9.30 per car, and (3) a per diem reclaim to the Milwaukee of $8.94 per car. Obviously, after payment of these expenses, there remains very little revenue to pay the expense of moving the traffic 92 miles from Little Lake to Iron Mountain.

As previously stated, the interchange tracks at Republic Junction were placed in operation in October 1957. An ex- [fol. 255] hibit of record shows that during the next 8 months the Ishpeming received 985 carloads of traffic from the Northwestern at Little Lake and only 91 carloads from the Milwaukee at Republic Junction and, excluding saw and chemical logs, it forwarded 1,508 carloads over the Northwestern at Little Lake and only 236 carloads over the Milwaukee at Republic Junction. While the Milwaukee's movement of logs during this period was practically double that of the Northwestern, the exhibit shows that the Northwestern's movement was more than double the amount moved during the next proceeding corresponding period. The record clearly shows that the establishment of the considered connection has diverted little, if any, traffic from the line of the Northwestern.

Duluth, like Northwestern, fears that traffic it is presently handling will be diverted to the new routes via Republic Junction. It presented an exhibit showing that during the year from November 1, 1956 to October 31, 1957, preceding the opening of the new routes, it handled through interchange with the Milwaukee at Champion, 795 carload shipments which, it claims, could have been moved over the new routes if they had been in existence. Of this traffic, 235 shipments moved to or from Ishpeming, 428 shipments moved to or from Marquette, and the remainder moved to or from Negaunee and points on Ishpeming's road not served by Duluth. Similar data for the period prior to the hearing during which the new routes were in existence were not presented for the record. The exhibit shows that 76 different commodities or classes thereof were handled during this period of which only 19 moved in quantities of 10 or more carloads. The latter consisted of 165

carloads of fuel oil, 134 carloads of charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. An exhibit presented by the applicants shows that they handled no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard or rosin via Republic Junc-[fol. 256] tion during the period from October 21, 1957, to June 30, 1958, both inclusive, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 roofing, 4 flooring, 3 tractors and 2 scrap iron. Other commodities which moved over applicants' lines via Republic Junction during this period in quantities in excess of 10 carloads consisted of 984 shipments of chemical wood, 545 of saw logs, 102 of charcoal, 29 ore, 22 sawdust, and 14 paper. Of the last-mentioned commodities, Duluth did not transport any shipments of chemical wood, saw logs or ore during the period covered by its exhibit. It appears, therefore, that applicants' service via Republic Junction is competitive with that of Duluth via Champion, principally with respect to the transportation of charcoal sawdust and paper, but the record does not show which of these routes is the more convenient for this traffic.

Section 1(4) of the act provides that it shall be the duty of every common carrier by railroad to establish reasonable through routes with other such carriers and provide reasonable facilities for operating such routes. No one has seriously questioned the reasonableness of the through routes via Republic Junction, established by the applicants. The record shows that by far the larger portion of the traffic moving over these routes consist of shipments of saw logs and chemical wood moving from points on the Ishpeming's road to Iron Mountain and that Northwestern is the only other carrier having a competitive rate for this traffic. The shipper of saw logs at Iron Mountain needs service over both routes in order to balance inbound shipments of saw logs with outbound shipments of lumber in connection with applicable manufacture and reshipping rates. Also a shipper of saw logs at Amasa needs appli-

cants' joint service because there is no other competitive route for its traffic. Division 4 should find that operation of the crossover and interchange tracks involved herein is required by the present and future public convenience and necessity.

There remains for consideration, the disposition of the supplemental application filed under section 5 of the act. [fol. 257] Obviously, after each applicant obtains authority to operate over the portions of the crossover track and interchange tracks belonging to them, their individual operations over those portions of the tracks belonging to the other company and the Milwaukee's operation over a portion of Duluth's main line north of the crossover is merely a switching movement which is exempt from the provisions of section 5 by the provisions of section 1(18). This application should be dismissed.

Recommended Findings

Division 4 should find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company have constructed and are operating at Republic Junction, Mich., a crossover track between their respective lines of railroad and two interchange tracks, in violation of the provisions of section 1(18)-(22) of the act; and order said carriers to discontinue said violation.

(2) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company of the crossover and interchange tracks constructed by these carriers at Republic Junction, Mich.

(3) That the supplemental application filed under section 5 of the act should be dismissed.

An appropriate order and certificate should be issued.

[fol. 258]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20048[1]

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.

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(1) Found that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act. Order entered requiring termination of such violation.

(2) Motion of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to dismiss the section 1(18) application in Finance Docket No. 20139 overruled.

(3) Present and future public convenience and necessity found not shown to require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of connecting and interchange tracks near Republic, Mich. Application under section 1(18) denied, and supplemental application under section 5 dismissed.

Henry S. Mitchell and *Thomas M. Beckley* for Duluth, South Shore & Atlantic Railroad Company.

R. K. Merrill, J. J. Nagle, L. S. Hamilton and *F. M. Long* for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

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[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, etc.

Bernard H. Davidson and *Philip H. Porter* for Lake Superior & Ishpeming Railroad Company.

C. H. Dickman and *Edgar Vanneman, Jr.*, for Chicago and North Western Railway Company.

REPORT OF THE COMMISSION—Decided September 25, 1959

Division 4, Commissioners Freas, Walrath, and Goff

By Division 4:

Exceptions to the report proposed by the examiner were filed by defendants in Finance Docket No. 20048 and by the interveners in Finance Docket No. 20139. Our conclusions in the latter proceeding differ from those of the examiner.

On January 8, 1958, the Duluth, South Shore & Atlantic Railroad Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, hereinafter re- [fol. 259] ferred to as complainant or the Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to Part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as the Milwaukee and the Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich.,[2] in violation of the provisions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation.

In answers filed February 13, 1958, by the Milwaukee, and February 14, 1958, by the Ishpeming, defendants admitted that they had constructed and were operating the tracks specified in the complaint but contended that such tracks are "switching tracks" within the purview of the exemption provided in section 1(22) and, therefore, that such actions were and are not in violation of the provisions of the act, stating that, if there were any doubt, they would file an application for appropriate authority.

[2] Unless otherwise specified, all points mentioned herein are in Michigan.

Such application under section 1(18) was filed in the embraced proceeding on March 27, 1958, and on August 1, 1958, it was supplemented by a filing under section 5(2) in which approval was sought of the joint use of certain trackage of each by the other. Subsequently, applicants moved to dismiss their applications which motion was subsequently made applicable on the ground that the tracks involved are "switching tracks" and, therefore, excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, the application, and the motion for dismissal of the application were assigned for hearing on a consolidated record. A hearing was held and the applications were there amended. Briefs were filed. No representations were made by State authorities. Complainant and the Chicago and North Western Railway Company, hereinafter referred to as North Western, were permitted to intervene in the application case.

[fol. 260] *The Complaint case*—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wisc., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee located in Michigan connected only at Champion with Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad, and at Iron Mountain with the line of the North Western extending between Escanaba and Ashland, Wisc.; and Ishpeming's line, so far as here material, connected at Marquette with Duluth's line, and at Little Lake with North Western's line extending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of (1) 262 feet of crossover track between the main lines of the Milwaukee and Ishpeming of which 148 feet are owned by the former and 114 feet by the latter; (2) a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both

turnouts are owned by the latter and 902 feet by the Milwaukee; and (3) a track 1,746 feet in length parallel and adjacent to and turning out of the last described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs, establishing through routes and joint rates on various commodities over their lines via this crossover track, which are now in effect.

[fol. 261] The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., and Republic at 10:45 p.m., and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., and Republic at 12:40 a.m., and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound train is scheduled to arrive at the cross-over track, hereinafter called Republic Junction, at 10 a.m., and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown and the engine then moves backwards over the crossover track and on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train, and proceeds to Channing. The Ishpeming's trains are oper-

ated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of section 1(18) and 5(2) and the complaint and the application here considered [fol. 262] should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18) and the motion to dismiss the application should be overruled.

As heretofore noted, defendants contend that the tracks under consideration are merely switching tracks and, as such, fall within the exemption provisions of section 1(22) of the act. They allege that the tracks are used merely to switch cars from one line to the other; that they are not used for the movement of trains; that no new territory is served by the carriers as a result of the connecting tracks; and that the establishing of the connection does not constitute an "extension" of the lines of either carrier, as that term is used in section 1(18) of the act. Defendants cite a number of Commission and court decisions which they contend fully support their position.

In *Texas & Pacific R. Co. v. Gulf C. & S. F. R. Co.*, 270 U.S. 266, 46 S. Ct. 266, the Supreme Court stated as follows:

> . . . A truer guide to the meaning of the terms "extension" and "industrial track" as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the build- [fol. 263] ing of unnecessary lines involves a waste of

resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. . . . The act sought, among other things, to avert such losses.

When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms "extension" and "industrial track" become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions, which the state regulating body is peculiary (sic) fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. . . .

Considered in the light of the facts involved and the above-quoted decision, it is our opinion that the tracks in question are not mere "switching tracks" utilized for loading, reloading, storing and switching the cars and for other things merely incidental to the regular train haul, but are, in fact, "extensions" of the lines of both defendants bringing them within the provisions of section 1(18) of the act.

While the physical movement of the cars from the line of one carrier to the other is, as contended by defendants, a switching movement, the act of placing or removing the cars on the connecting tracks is not a mere switching operation that is incidental to a regular train movement. Instead, it is an actual part of the through movement of the [fol. 264] traffic without which there would be no through movement by the defendant carriers. It is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants. Through the use of the connecting tracks defendants have established a through route for the handling of traffic and, as stated by the Supreme Court in *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 198, "through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system."

Prior to the construction of the connecting tracks there was no connection between defendant lines; there was no way that traffic could be routed from origin to destination over the lines of the defendants; and all traffic destined to points on either of the defendant lines would have moved over routes in which other carriers would have participated. Thus, the creation of the connection enabled both defendants to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers.

The courts and the Commission have uniformly held that connecting tracks to be operated under circumstances such as those here involved constitute "extensions" of rail lines within the meaning of section 1(18)-(21) and that they are not excepted from those provisions by the provisions of

section 1(22). (See *Texas & Pacific R. Co.* v. *Gulf C. & S. F. R. Co., supra; State of Georgia* v. *United States,* 156 F. Supp. 711; *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.,* 286 Fed. 540; *Citizens of Pipestone* v. *Chicago M. & St. P. Ry. Co., et al,* 208 N.W. 809; *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.,* 5 F. (2d) 777; *Charleston & W. C. Ry. Co. Construction,* 166 I.C.C. 707; and *Great Southwest Railroad Inc. et al. Construction, Etc.,* —— I.C.C. —— (not printed in full), decided June 3, 1958). Under the circumstances here existing, the construction of the connecting and interchange tracks here in- [fol. 265] volved constitute an extension of the lines of the defendants which lawfully could be constructed or operated only upon obtaining an appropriate certificate from this Commission. An order will be entered in the title proceeding requiring the termination of the violation of section 1(18)-(22) of the act, and the motion to dismiss the section 1(18) application in Finance Docket No. 20139 will be overruled.

The application case—In attempting to establish that the present and future public convenience and necessity require operation over the connecting and interchange tracks, applicants rely in part upon evidence showing traffic moving over the connection since its establishment. Interveners contend that, inasmuch as the traffic was not handled under any color of right, such evidence should be disregarded for that purpose. They assert that the granting of authority to operate the connection, based upon evidence concerning the traffic transported thereover, would have the effect of sanctioning the violation of section 1(18)-(22) and would not be consistent with the public interest.

While we do not condone the failure of applicants to utilize proper caution before proceeding to establish the connection in question, we are of the opinion that the disputed evidence is admissible on, though not controlling of, the issue of public convenience and necessity.

As stated, the crossover and interchange tracks were constructed in the fall of 1957, and operations thereover were instituted on October 21 of that year. The overwhelming preponderance of the traffic moving over the connection during the first 8 months of operations consisted of saw

logs and chemical wood. Out of a total of 1,756 cars interchanged between the Milwaukee and the Ishpeming at Republic Junction during the period October 21, 1957, through June 30, 1958, 1,629 originated at points located on Ishpeming's line and terminated at points on Milwaukee's line; 50 originated on the Ishpeming's line and terminated at points beyond the Milwaukee's line; 51 originated at the Mil- [fol. 266] waukee and terminated on the Ishpeming; and 26 originated at points beyond the Milwaukee and terminated on the Ishpeming. Of the 1,629 shipments mentioned, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. These 2 commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of that delivered by the Ishpeming to the Milwaukee.

Applicants' only evidence relating to the transportation of commodities other than saw logs and chemical wood was an exhibit showing the shipments interchanged between the Ishpeming and the Milwaukee at Republic Junction during the same 8-month period. While 21 different commodities or classes thereof, other than saw logs and chemical wood, were handled, only three moved in quantities of 10 or more carloads: 102 carloads of charcoal, 22 carloads of sawdust, and 27 of ore. No testimony was presented by any shipper or consignee respecting any need or desire for service over the connection at Republic Junction as to commodities other than saw logs and chemical wood.

A company engaged in the manufacture and sale of lumber, juvenile furniture, and charcoal at Iron Mountain, hereinafter called the Iron Mountain shipper, and a manufacturer of hardwood lumber located at Spur 247, approximately 2 miles out of Amasa on the Milwaukee line, hereinafter called the Amasa shipper, support the application. The Iron Mountain shipper obtains about 90 percent of its supply of saw logs (for the manufacture of lumber) and a small percentage of its supply of chemical logs (for the manufacture of charcoal) from the Cleveland Cliffs Iron Company; such logs received by rail are trucked to the railhead at Sunrise Landing, the eastern terminus of the Ishpeming's line, thence by rail to shipper's plant. Prior to

1958, practically all of its shipments were transported by rail, but since that time approximately 50 percent have moved by truck. Logs formerly moved from Seney (on the Duluth) to Champion, thence via the Milwaukee to Iron Mountain, or via Duluth to Ishpeming, thence North Western to Antoine Junction north of Iron Mountain, where they are delivered to Milwaukee for reciprocal switching to the [fol. 267] plant. Saw logs move on so-called manufacture and reshipping rates and, in order to receive the transit privilege accruing under such rates, the shipper must route a proportion of its saw logs into Iron Mountain via both of the carriers serving Iron Mountain (the Milwaukee and the North Western) if it is to be enabled to ship finished material outbound over both carriers.

So long as the saw logs moved out of Seney, the shipper had no routing problem since the Duluth had connections with the Milwaukee at Champion and with the North Western at Ishpeming, thus providing alternative routes to Iron Mountain, and traffic could be routed over either of the delivering lines as desired. Since the establishment by the Ishpeming in October 1957, of an extension of its line (about 16 miles, between Cusino and Sunrise Landing) in Schoolcraft and Alger Counties, Mich., authorized in *Lake Superior & Ishpeming Railroad Company Construction*, 295 I.C.C. 812, hereinafter called the *Extension* case, Sunrise Landing, rather than Seney, has been utilized by Cleveland Cliffs as the shipping point for its logs; about 15 miles to the northeast of Seney, it is closer to the logging operation, making it less expensive to truck the logs to the rail head. Since Sunrise Landing is not served by the Duluth, the alternative two-line routing via Duluth-Champion-Milwaukee-Iron Mountain is no longer available. A two-line route from Sunrise Landing via the Ishpeming-Little Lake-North Western-Iron Mountain, is available, but the only routing from points on the extension over the Milwaukee is a three-line movement, with the Duluth a bridge carrier between Marquette and Champion.

Inasmuch as a three-line haul to its plant would involve higher transportation costs and was, therefore, not considered feasible, the Iron Mountain shipper urged the applicants to establish the connection at Republic Junction so

that it could have alternative two-line routings over either the North Western or the Milwaukee to its plant.

The Iron Mountain shipper obtains its supply of chemical logs from several sources and more than 50 percent thereof is transported by truck. Chemical logs move on [fol. 268] relatively low rates but the costs involved in routing such shipments in more than a two-line haul may be prohibitive. Chemical wood does not move on transit rates and, therefore, the shipper does not require the alternative routing on that commodity. Nevertheless, it has been the practice of this manufacturer to divide the traffic between the Milwaukee and the North Western for the delivery of its chemical wood since the establishment of the connection at Republic Junction.

The shipper receives approximately 65 carloads of chemical logs and from 15 to 30 carloads of saw logs from Sunrise Landing each week, controlling the routing and paying the freight charges. Although its witness expressed the opinion that the route via the connection at Republic Junction involves less transit time than would be involved if shipments were routed over the North Western, upon cross examination he was not able satisfactorily to support his position. Transit time is important during the summer months because lumber is subject to stain if manufactured much more than 10 days after the logs are cut and shipper desires to work the logs as soon after cutting as possible. The shipper is of the opinion that it is able to receive more definite information on the progress of its shipments when routing is via the Milwaukee, and desires the continuance of such service, made possible by the connection at Republic Junction.

The Amasa shipper, located on the Milwaukee, also utilizes the service of applicants for the delivery of shipments of saw logs from Sunrise Landing. This company also moves its shipments under manufacture and reshipping rates, and, prior to the time Ishpeming extended its line to Sunrise Landing, its shipments originated at Seney. There was a two-line route available from Seney to its plant via Duluth-Champion-Milwaukee. By reason of the new connection at Republic Junction, there is a two-line route available to the plant from Sunrise Landing, but any other route

would involve a three-line haul, which, it feels, would involve prohibitive rates. This shipper receives approximately 200 carloads of logs per year from Sunrise Landing but utilizes truck services from other sources to obtain more than one-half of its log supply.

[fol. 269] In the event the connection at Republic Junction were closed and it became necessary to utilize a three-line movement involving higher rates, shipper would turn to truck service for the delivery of its logs. Although delivery delays were experienced from Seney, as well as "bunching" of cars, making it necessary to unload to a dock and to rehandle the logs in order to avoid demurrage, the record does not indicate whether these shortcomings were occasioned by the Duluth or the Milwaukee. The service presently rendered over the connection at Republic Junction is entirely satisfactory to this shipper; it has experienced no "bunching" of cars, and it finds that it is easier to obtain definite information concerning shipments, and that deliveries can be depended upon to arrive on time.

The Ishpeming owns 258 flatcars which are used in transporting saw logs and chemical wood. Of these, 88 have become somewhat worn and are in such condition that they cannot be utilized if placed in large trains. The North Western, which operates longer trains on the lines over which all the saw logs would move were it not for the new connection, has notified the Ishpeming that it no longer can accept in interchange any of the 88 cars mentioned. The Milwaukee, however, operates only light trains through the connection at Republic Junction and the 88 cars mentioned are entirely adequate for use in such trains. This has resulted in a substantial saving to the Ishpeming since it makes it possible for it to avoid per diem charges on cars owned by other carriers. By being able to use all of its flatcars, and by virtue of a quicker turn-around of cars effected by the Milwaukee than was provided by the North Western, the Ishpeming's fleet of flatcars is adequate to meet the existing need for that type of car.

The North Western and the Duluth vigorously oppose the granting of any authority to applicants for operation of the connection at Republic Junction. They contend that the unauthorized construction and operation of the connection

has resulted in a substantial diversion of traffic that had previously moved over their lines; that the continued operation of the connection would have a further adverse [fol. 270] effect upon their business by increasing that diversion; that there has been no showing that the public convenience and necessity require operations over the connection; and that applicants have failed to prove that existing carriers cannot adequately, economically and efficiently handle the traffic now moving over the connection.

With respect to movements of commodities other than saw logs and chemical wood, the competition for traffic resulting from the connection at Republic Junction has not resulted in any substantial diversion of traffic from the North Western and the Duluth to the Milwaukee. During the 9-month period, November 1, 1956, to July 31, 1957 (a period prior to the establishment of the connection), the North Western delivered to the Ishpeming at Little Lake 1,383 carloads of commodities other than saw logs and chemical wood, and during the 9-month period, November 1, 1957, through July 31, 1958 (a period immediately following the creation of the connection), it delivered 893 carloads of such commodities, or 490 carloads less than during the prior period. During the later period, however, the Milwaukee transferred to the Ishpeming only 62 carloads of such commodities. At most, therefore, the North Western suffered a diversion of only 62 carloads of such traffic. Southbound, the Ishpeming transferred to the North Western 2,349 carloads (other than saw logs and chemical wood) in the 9-month period ended July 31, 1957, and 1,508 in the 9-month period ended July 31, 1958, a difference of 841 carloads. During the latter period, however, there were only 236 carloads (other than saw logs and chemical wood) forwarded by the Ishpeming over the Milwaukee. Thus, on such other commodities, the North Western could not have lost during the first 9 months of operation over the connection more than 62 carloads of the northbound traffic and 236 carloads of the southbound traffic. This amounts to only 7 percent of the 1956-57 volume of traffic (other than saw logs and chemical wood) interchanged by the Ishpeming and the North Western, and less than 12 percent of the total traffic interchanged between the Ishpeming, on the one

hand, and the North Western and the Milwaukee, on the other, during the 9-month period of 1958 specified.

[fol. 271] While there was no documentary evidence presented showing any specific diversion of traffic from the Duluth as a result of the new routes via Republic Junction, the Duluth did present an exhibit showing that, during the year from November 1, 1956, to October 31, 1957 (a period preceding the opening of the new routes), it handled through interchange with the Milwaukee at Champion 795 carload shipments which, it claims, could have been transported over the new routes had they been in existence. Of this traffic, 235 shipments moved to or from Ishpeming, 428 moved to or from Marquette, and the remainder moved to or from Negaunee and points on the line of the Ishpeming not served by the Duluth. Similar data for the period prior to the hearing but during the time the new routes were in existence were not presented for the record. The aforementioned exhibit shows that 76 different commodities or classes thereof were handled during the period indicated, of which there were 19 that moved in quantities of 10 or more carloads: 165 carloads of fuel oil, 134 charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. During the first 8 months of operation over the connection at Republic Junction the Ishpeming and the Milwaukee interchanged no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard, or rosin, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 each of roofing and flooring, 3 of tractors, and 3 of scrap iron. Of the commodities other than saw logs and chemical wood interchanged by the Ishpeming and Milwaukee during the period mentioned and moving in quantities in excess of 10 carloads, there were 29 carloads of ore, 22 of sawdust, and 14 of paper.

While the foregoing does not permit accurate measurement of the amount of traffic diverted from the Duluth since the new routes via Republic Junction were established, it does establish that comparatively little of the type of traffic, other than saw logs and chemical wood, that was han-

dled by the Duluth prior to the existence of the connection [fol. 272] has since been interchanged between the Ishpeming and the Milwaukee. It is also evident that the North Western has continued to handle substantial volumes of traffic consisting of commodities other than saw logs and chemical wood notwithstanding the new connection.

As stated, no testimony was presented by any shipper or consignee as to commodities other than saw logs and chemical wood. Regardless of the amount of such traffic that may have already been diverted as the result of the connection at Republic Junction or the amount that might be diverted in the future, the record shows that the North Western and the Duluth have continued to handle the preponderance of such traffic that has moved over the lines of the Ishpeming since the creation of the connection at Republic Junction and there is nothing of record to indicate that the service afforded by the North Western and the Duluth in transporting such commodities is in any way inadequate or that there is a need for any additional service. In situations where existing facilities are physically adequate, the addition of more facilities is unwarranted unless it is apparent that some insurmountable obstacle operates to prevent use, in full, of the facilities already in existence. *Atchison, Topeka and Santa Fe Railway Company Construction*, 261 I.C.C. 227. There is nothing to indicate that the facilities of the North Western and the Duluth cannot be fully utilized for the transportation of commodities other than saw logs and chemical wood or that such carriers are unwilling or unable to provide a reasonably satisfactory service in the transportation of such commodities.

The overwhelming preponderance of the traffic moving over the connection consists of saw logs and chemical wood and the only public support of the applications is that of the two shippers interested in the transportation of those commodities from Sunrise Landing to their respective places of business. The circumstances leading to applicants' present service to those shippers and over the new connection require special consideration, including our taking official notice of the report in the *Extension* case, in determining the basic question of public convenience and necessity.

[fol. 273] As heretofore indicated prior to 1957 there was a substantial movement of saw logs and chemical wood from Seney to Iron Mountain via the Duluth and the Milwaukee and the Duluth and the North Western, and of saw logs from Seney to Amasa via the Duluth and the Milwaukee.

The Iron Mountain shipper urged the Cleveland Cliffs Iron Company, the supplier of the logs and also the controlling stockholder of the Ishpeming, to find some means of supplying and transporting the logs to Iron Mountain at a reduced over-all cost, specifically suggesting the extension of the line of the Ishpeming to a point in the area northeast of Seney closer to the source of the logs. As a result thereof, the Ishpeming filed its application in the *Extension* case, and operations from Sunrise Landing were instituted in October 1957.

The record establishes that, although it urged the Sunrise Landing extension, the Iron Mountain shipper was aware that if it obtained its saw logs from Sunrise Landing, it no longer would have a two-line route which included the Milwaukee in the absence of a connection between the latter and the Ishpeming, and that without such connection, the only two-line route from Sunrise Landing was via the Ishpeming to Little Lake and the North Western beyond.

Although the report in the *Extension* case states that none of the traffic transported over the extension would be in any "material degree subject to the competition of connecting lines for its routing," thus indicating that most of the traffic would be interchanged with but one carrier, the witness for the Iron Mountain shipper does not believe that the Ishpeming, in applying for the aforementioned extension, contemplated movement of all the saw logs and chemical wood from Sunrise Landing to Iron Mountain via the North Western, he having personally urged, on behalf of his company, the establishment of the connection with the Milwaukee at Republic Junction.

While the record herein does not definitely establish that the proposal for the Sunrise Landing extension and the establishment of the Republic Junction connection were made simultaneously, and that the parties were necessarily [fol. 274] aware, at the time the extension application was

being considered, that the connection with the Milwaukee would be established and utilized for the interchange of traffic moving over the extension, it is noted that operations over the extension were instituted on approximately the same date that service over the connection at Republic Junction was inaugurated. The record does make it clear, moreover, that the competitive situation changed substantially when operations began over the extension, and that such change resulted from the use of the new connection for traffic moving from the extension.

When its shipments originated at Seney, the Iron Mountain shipper had alternative routings available to it, one via the Duluth to Champion thence to its plant via the Milwaukee. The record establishes that this shipper knew at the time the extension was being considered that there was no physical connection between the lines of the Ishpeming and the Milwaukee, and that the shifting of the origin of its shipments from Seney on the Duluth to Sunrise Landing on the Ishpeming would involve the loss of the two-line routing via the Milwaukee. It is clear, therefore, that either the manufacturer had no interest in a route via the Milwaukee, or it knew at the time the extension was being considered that the connection at Republic Junction was to be established. On the basis of representations made by the applicants that the creation of the connection at Republic Junction was not contemplated at the time the extension to Sunrise Landing was under consideration, we must conclude that the manufacturer, at that time, was primarily interested in originating its saw logs and chemical wood closer to their source, and that the lack of a two-line route via the Milwaukee from the new origin point was of no material concern to it.

Notwithstanding this earlier apparent lack of interest in the alternative two-line routing via the Milwaukee, the Iron Mountain shipper now bases its support of the instant application upon a need for a two-line routing on shipments of saw logs which will enable it to take advantage of the transit privileges accorded thereunder by utilizing the Milwaukee on outbound shipments of finished lumber.

[fol. 275] Prior to the construction of the Sunrise Landing the rates on saw logs from Seney to Iron Mountain

were substantially lower than those from Cusino, then the easternmost point on the Ishpeming. After operations were instituted on the extension, however, the rates from Sunrise Landing to Iron Mountain were reduced below those applicable from Seney to Iron Mountain. With this rate reduction, and the reduction in the trucking costs incident to moving the logs to the railhead, the Iron Mountain shipper realized substantial savings in the over-all delivered cost of its saw logs. This shipper, of course, still may obtain saw logs from Seney, should it desire to do so, and, from that point, the two-line route via the Duluth to Champion, thence the Milwaukee to Iron Mountain is available. By using such route, the shipper can balance its inbound shipments with outbound shipments via the Milwaukee; it concedes that the service received on shipments from Seney was satisfactory, that, if delivery could be made for the same over-all price as now prevails on shipments from Sunrise Landing, it would have no objection to having its shipments originate at Seney, and that in such circumstances its claimed need for service via Republic Junction would no longer exist. Use of the Seney railhead, however, involves trucking costs approximately $21 a carload in excess of those to Sunrise Landing. Unless it can obtain the delivery of its logs at a cost no higher than the present delivered cost on shipments from Sunrise Landing, the shipper represents that it will utilize trucks for the delivery of all of its logs, which are available from suppliers other than Cleveland Cliffs, although it does not indicate what the cost of such delivery would be. As heretofore indicated, the rail rates from Sunrise Landing are now lower than the previous rates from Cusino, although Sunrise Landing is 16 miles farther from Iron Mountain.

The Amasa shipper also supports the application to retain the two-line route via the Ishpeming and the Milwaukee. Although this shipper now claims that it could not afford to utilize the three-line route, which would be the only route available to its plant from points on the Sunrise Landing extension if the connection at Republic Junction [fol. 276] were eliminated, the record shows that this shipper knew of the extension application filed by the Ishpeming, and that Cleveland Cliffs would originate shipments of

saw logs at points on the extension if that application were granted. The record shows too that this shipper also was aware that, in the absence of a connection at Republic Junction, there would be no two-line service available to it off the extension if that application was approved. Despite such knowledge, this shipper did not participate in the *Extension* case. It appears, therefore, that, at the time the extension application was being considered, either the shipper was not concerned with a need for a two-line route to its plant from points on the extension or it was aware that such a route would be available by the establishment of the connection at Republic Junction; as with the Iron Mountain shipper, we must assume, in the circumstances, the first alternative.

When the origin point for its traffic shifted to Sunrise Landing, the Amasa shipper realized a saving of $3 per thousand log-feet, or 2.2 cents per pound in the cost of trucking the shipments to the railhead over the cost that had been involved in trucking the logs to the railhead at Seney. Shipper believes that the present rate on saw logs from Sunrise Landing to its plant is too high and at the time of the hearing was negotiating for a rate approximating that prevailing from Sunrise Landing to Iron Mountain; unless it obtains such a rate, it intends to discontinue rail service and to utilize trucks for the transportation of all its logs.

If the Republic Junction connection were closed, the savings the shipper would realize in trucking costs to the railhead at Sunrise Landing would be more than offset by the added transportation costs involved over the three-line route via the Ishpeming, the Duluth, and the Milwaukee. The two-line service necessary in order that this shipper may take advantage of the manufacture and reshipping rates is, and has been available to it from Seney. In the absence of the new connection, however, it is obvious that the shipper would have to weigh the respective advantages of two-line service from Seney, under which it may use the manufacture and reshipping rates, three-line service from [fol. 277] Sunrise Landing, in connection with which it enjoys low trucking costs, and through movement of its logs by truck.

There is no indication that this shipper has requested Cleveland Cliffs to originate its saw logs at Seney rather than at Sunrise Landing or that it has attempted to obtain its saw logs from any source other than Cleveland Cliffs. There is also nothing to indicate that the shipper, in an attempt to utilize from Seney the two-line service it allegedly requires, has made any attempt to negotiate for a reduction in the trucking costs, the freight rate, or in the other costs involved in obtaining delivery of its saw logs.

It is apparent that the interests of the supporting shippers would be served by utilizing the Republic Junction connection; and that such interests are important in determining the question of public convenience and necessity. But where, as here, the shippers are already provided with adequate transportation service, the benefits which would inure to them by routing over that connection must be weighed against the detrimental effect, if any, resulting therefrom. *Chamber of Commerce, Breckenridge, Tex., et al.* v. *Wichita Falls, Ranger & Fort Worth Railroad Company, et al.*, 109 I.C.C. 81. This includes the probable effect upon competing carriers. As shown in the *Extension* case, the Duluth opposed the granting of authority to the Ishpeming to extend its line to Sunrise Landing, contending that the Ishpeming, as a controlled subsidiary of Cleveland Cliffs would become the originating carrier of the most important shipper from the involved area, and that Cleveland Cliffs might thereby obtain benefits which would result in certain abuses not consistent with the provisions of the act and the public interest. As noted therein, it had been represented that all traffic involved would be outbound and that it would not in any material degree be subject to the competition of connecting lines for its routing. Accordingly, it was found that the record therein did not justify a conclusion that the abuses anticipated by the Duluth would occur.

As heretofore indicated, however, the competitive situation changed substantially when operations over the extension were inaugurated, use of the unauthorized connection [fol. 278] providing the Iron Mountain shipper with an alternative two-line route via the applicants' lines and the Amasa shipper with a single two-line route, again over ap-

plicants' lines, and both such routes made possible by the connection have been used extensively. Although applicants contend that very little of the traffic moving thereover has been diverted from interveners and assert that, by reason of the low rates under which such commodities move, those carriers would be better off without that traffic, the record shows that use of the unauthorized connection has resulted in traffic being diverted from interveners to applicants; moreover, even though the commodities involved are low rated, the traffic is nevertheless important to the North Western and the Duluth. These carriers have afforded a transportation service for such commodities over a long period of time, and there is merit to their assertion that in order for any carrier to handle such traffic profitably, it must be handled in large quantities. The North Western contends that the division of the traffic resulting from the establishing of the unauthorized connection will so reduce the volume to be handled by the individual carriers, and thus, so increase their unit costs, that it will be impossible for any of them to realize profit therefrom, possibly resulting in a curtailment of service, especially since the traffic involved moves on scheduled trains.

Since the record shows that a large number of shipments of saw logs and chemical wood have moved over the Republic Junction connection since its establishment in October 1957, whereas all that traffic formerly moved over the lines of other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful [fol. 279] competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.

Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connection making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection. In the circumstances, the section 1(18) application should be denied, and the supplemental application under section 5 dismissed.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and have been found to be without material significance or not justified.

Findings

We find: 1. That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act; and that, accordingly, the motion filed by such carriers to dismiss the section 1(18) application in Finance Docket No. 20139 should be overruled; and

[fol. 280] 2. That the present and future public convenience and necessity are not shown to require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Com-

pany of the connecting and interchange tracks near Republic, Mich., and, therefore, that the section 1(18) application in Finance Docket No. 20139 should be denied, and the supplemental section 5 application therein be dismissed.

An order will be entered requiring the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, within 45 days from the effective date thereof, to cease and desist, and thereafter to abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks near Republic, Mich., overruling the motion to dismiss the section 1(18) application in Finance Docket No. 20139, denying said application, and dismissing the supplemental section 5 application.

Commissioner Freas concurs in the result.

[fol. 281]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Division 4

Washington, D. C.

Finance Docket No. 20048

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

Finance Docket No. 20139

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL. OPERATIONS, ETC.

ORDER—September 25, 1959

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held,

and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That within 45 days of the effective date of this order, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company be, and they are hereby, required to cease and desist, and thereafter abstain, in the absence of appropriate authority therefor, from the maintenance and operation of the connecting and interchange tracks near Republic, Mich., found in said report to constitute violation of section 1(18)-(22) of the Interstate Commerce Act;

It is further ordered, That the motion of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to dismiss the section 1(18) application in Finance Docket No. 20139 be, and it is hereby, overruled;

It is further ordered, That said application be, and it is hereby, denied; and that the supplemental section 5 application in the same docket be, and it is hereby, dismissed; and

It is further ordered, That this order shall be effective 35 days from the date of service hereof.

By the Commission, division 4.

Harold D. McCoy, Secretary.

(Seal)

[fol. 282]

BEFORE THE INTERSTATE COMMERCE COMMISSION

Washington, D. C.

Finance Docket No. 20048

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

Finance Docket No. 20139

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL. OPERATIONS, ETC.

ORDER—April 7, 1960

Upon consideration of (1) the record in the above-entitled proceedings; (2) the joint petition of defendants (or applicants) filed December 9, 1959, for reconsideration and for oral argument; and (3) the joint reply to the petition by complainants (or protestants) filed December 28, 1959; and

It appearing, That the material matters set forth in the petition have been considered by division 4 and discussed in its report, that the decision is based on adequate findings supported by the record, that there has been presented no error of fact or law with respect to the matters complained of, and that no showing has been made warranting reconsideration of said decision or oral argument with respect thereto:

It is ordered; That said petition for reconsideration and oral argument be, and it is hereby, denied; and

It is further ordered, That the order of division 4 in said proceeding dated September 25, 1959, be, and it is hereby, made effective 15 days from the date of service hereof.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 283] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed July 18, 1960

The United States of America and the Interstate Commerce Commission, defendants herein, answer the complaint as follows:

I.

Admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 18 and 19.

II.

Admit the allegations contained in paragraph 7 that plaintiffs constructed and commenced operation over certain tracks near Republic, Michigan, on or about October 21, 1957, but deny that said trackage is a cross-over track between the main lines of plaintiffs and aver that it is an extension of the respective lines of plaintiffs' railroads which were constructed and are being operated in violation of Sections 1(18)-(22) of the Interstate Commerce Act,

[fol. 284] 49 U.S.C.A. 1(18)-(22). In further answer to said allegations defendants deny, for lack of information sufficient to form a belief, that the photographs attached to the complaint as Exhibit D are true and correct representations of the extension of lines constructed by plaintiffs at Republic Junction, Michigan. Since said photographs were not introduced in evidence before the Commission and are not a part of the record in said administrative proceeding, they are inadmissible as evidence in this action which is limited to review of the order of the Commission based on the record made before the Commission. *Mississippi Valley Barge Lines* v. *United States*, 292 U.S. 282, 286-7.

III.

Deny the allegations contained in paragraph 8.

IV.

Admit the allegations contained in paragraph 9 but deny that said trackage is merely a switching connection and not an extension of the respective lines of plaintiffs.

V.

Admit the allegations contained in paragraph 10 but deny that Section 1(4) of the Interstate Commerce Act required or authorized plaintiffs to establish the said extension without prior approval of the Commission.

VI.

Deny the allegations contained in paragraph 11.

VII.

Admit the allegations contained in paragraphs 16 and 17, but refer to the recommended report and order of the [fol. 285] examiner and the report and order of Division 4 for a true, complete and accurate statement of their contents.

VIII.

Deny each and every allegation contained in paragraph 20 and the subparagraphs thereto, and paragraph 21 and the subparagraphs thereto.

IX.

In answering the allegations of paragraph 22, the defendants deny that the plaintiffs will suffer any legal injury or damage as a result of the orders of the Commission or that said orders prohibit the plaintiffs from complying with any duty imposed upon them by the Interstate Commerce Act.

X.

In answering the allegations of paragraph 23, the defendants deny that plaintiffs will suffer any legal injury or damage as a result of the orders of the Commission, but admit that the only remedy that the plaintiffs have to set aside the said orders of the Commission is in this action.

XI.

For further answer to the allegations of the complaint, defendants deny that the action of the Commission challenged herein is unlawful for the reasons specified in the complaint or for any other reason whatsoever. Defendants aver that the action of the Commission is fully supported and justified by the record, and that in taking such action, the Commission carefully considered and weighed in light [fol. 286] of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the proceedings by their respective counsel, and that said action is not arbitrary, capricious, unjust or contrary to law.

Except as herein expressly admitted, defendants deny each and every allegation contained in the complaint.

Wherefore, defendants pray that the preliminary injunction heretofore issued June 13, 1960, be vacated, that the relief sought in the complaint be denied, and that the complaint be dismissed with costs.

John H. D. Wigger, Richard H. Stern, Attorneys, Department of Justice, Washington 25, D. C.;

Robert A. Bicks, Acting Assistant Attorney General; Edward G. Minor, United States Attorney, Eastern District of Wisconsin, Milwaukee, Wisconsin;
Attorneys for the United States of America.

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.;
Robert W. Ginnane, General Counsel;

Attorneys for the Interstate Commerce Commission.

[fol. 287] Certificate of Service (omitted in printing).

[fol. 288] Acknowledgment of Service (omitted in printing).

[fol. 289]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT, CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Intervening defendant, Chicago and North Western Railway Company (hereinafter called the "North West-

ern"), makes this its answer to the complaint in the above-entitled cause.

1. North Western admits the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6.

2. In answer to paragraph 7, North Western admits that the plaintiffs constructed and commenced operation over certain tracks near Republic, Michigan on or about October 21, 1957, but denies that said trackage comprises a cross-over track between the main tracks of plaintiffs' respective lines, and avers that such trackage amounted to an extension of their respective lines of railroad in violation of the provisions of Section 1(18)-(22) of the Interstate Commerce Act.

[fol. 290] 3. In answer to paragraph 8 of plaintiffs' complaint, North Western denies that said interchange connection is now and at all times has been used exclusively for interchange switching of carload traffic, and avers that such switching operation is an integral part of the movement of through traffic between the lines of the two plaintiffs. North Western admits that cars are interchanged between the plaintiffs at this point. North Western denies that no new territory or shippers are now or ever have been served by said track or extension, and avers that said extension allows traffic to move over the lines of the two plaintiffs which otherwise would move over or via routes of other rail carriers. North Western denies that plaintiffs do not conduct and have never conducted line-haul operations over said extension, and denies that the use of the said extension is confined to switching movements incidental to the interchange of cars.

4. In answer to paragraph 9 of the complaint, North Western admits that rail traffic is now and has continuously moved over said extension since its establishment, but denies that such extension is merely a switching connection. North Western admits that the traffic over such extension has consisted in part of saw logs and chemical wood, but avers that substantial volumes of other commodities have moved and continue to move over said extensions.

5. In answer to paragraph 10 of the complaint, North Western admits that Section 1(4) of the Interstate Commerce Act requires the establishment of reasonable through routes and reasonable facilities for the operation thereof, but avers that such section did not require or call for the plaintiffs to establish the said extension.

[fol. 291] 6. In answer to paragraph 11 of the complaint, North Western denies that said extension fulfills any requirements of Section 1(4) of the Interstate Commerce Act, and avers that the establishment of said extension does not establish a reasonable through route or reasonable facilities as contemplated or provided for under said Section 1(4).

7. North Western admits the allegations contained in paragraph 12 of the complaint in that plaintiffs failed to obtain authority prior to the establishment of said extension.

8. North Western admits the allegations contained in paragraphs 13, 14 and 15 of the complaint to the extent that said paragraphs correctly summarize the contents and allegations contained in the various petitions filed in this matter with the Interstate Commerce Commission, but, except as so admitted, North Western denies the allegations of paragraphs 13, 14 and 15. In addition, North Western avers that it was permitted to intervene in the matter denominated Finance Docket 20139 before the Interstate Commerce Commission by its order dated May 19, 1958.

9. In answer to paragraph 16 of the complaint, North Western admits the matter of the complaint and the authority application were consolidated and that a hearing thereon was held before the Commission on September 5, 1958. North Western further admits that the examiner found that the Interstate Commerce Commission had jurisdiction and that public convenience and necessity required the continued maintenance and operation of the extension in question. North Western avers, however, that the examiner in his report recommended that Division 4 of

the Interstate Commerce Commission order the matter referred to the United States attorney, pursuant to Section [fol. 292] 12(1) of the Act, with a request that prosecution be undertaken under the penal provisions of the Act against the plaintiffs herein.

10. North Western admits the allegations contained in paragraph 17, including the fact that said trackage was an extension and that plaintiffs were ordered to cease and desist from maintaining and operating said extension.

11. North Western admits the allegations contained in paragraph 18 of the complaint, and avers that the North Western and the Duluth, South Shore and Atlantic Railroad Company filed a joint reply to the plaintiffs' petition for reconsideration. North Western further avers that on May 3, 1960, the plaintiffs, by telegram, requested the Commission to extend the time for compliance with the cease and desist order pending any further litigation attempts; and that on May 4, 1960, the Interstate Commerce Commission refused such request for the requested extension of time.

12. North Western denies each and every allegation contained in paragraphs 20 and 21 of the complaint wherein plaintiffs variously aver certain errors on the part of the Interstate Commerce Commission.

13. In answer to paragraph 22 of the complaint, North Western admits that if the plaintiffs comply with the cease and desist order in question, they will be unable to interchange traffic at Republic Junction, but North Western avers that if such order is complied with, such traffic will be moved by the rail carriers who are and have been entitled to such traffic, consistent with the national transportation [fol. 293] policy, and which carriers would have moved such traffic in the event the said extension had not been established in violation of the provisions of Section 1(18)-(21) of the Interstate Commerce Act. North Western denies that the plaintiffs will at any time be prohibited from complying with any duty imposed by the Interstate Commerce Act because of compliance by them with the cease

and desist order of the Interstate Commerce Commission in this matter.

14. In answer to paragraph 23 of the complaint, North Western denies that plaintiffs have sustained or will sustain actionable damages, and denies that any such damage is irreparable or that plaintiffs lack adequate remedy at law.

15. In further answer to said complaint, the North Western avers that prior to the construction of the said extension in question, the Lake Superior and Ishpeming Railroad Company (hereinafter called "Ishpeming") had no facilities for direct interchange of freight with the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter called "Milwaukee"); however, prior to such extension being established, and at the present time, facilities exist for interchange of freight between the Ishpeming and the North Western at Negaunee, Little Lake and Ishpeming, Michigan, between the Ishpeming and the Soo Line at Eben Junction and Manistique, Michigan, and between the Ishpeming and the Lake Superior Railway Company at Doty, Michigan.

The only shipper support for the said extension came from two shippers who desired to provide a route Ishpeming-Milwaukee via Republic Junction for saw logs and chemical wood originating on the east branch of Ishpeming, [fol. 294] being that branch extending to Sunrise Landing, and moving to Iron Mountain and Amasa. Virtually all of the logs and chemical wood moving over said extension originate at Sunrise Landing and terminate at Iron Mountain. Such logs and chemical wood could before such extension, and still can, move from Sunrise Landing to Iron Mountain by the Ishpeming-North Western via Little Lake on a competitive basis with the Ishpeming-Milwaukee route. The North Western is ready, willing and able to handle such traffic. If this unauthorized extension had not been constructed in violation of the provisions of Section 1(18)-(21) of the Interstate Commerce Act, a two line route would be available for the movement of logs and chemical wood from Sunrise Landing to Iron Mountain by

the Ishpeming-North Western via Little Lake, and the North Western would have participated in all of such movement, as well as a large portion of other traffic now moving via Republic Junction and the Milwaukee. The North Western avers that the interest of two shippers to secure an additional route to obtain possible lower rates must be weighed against the detrimental effect to the existing carriers in the area and the public interest resulting from present and future diversion of traffic over the aforesaid unauthorized extension.

Wherefore, North Western, having fully answered the allegations of the complaint, prays that the relief sought by [fol. 295] the complaint be denied, that the complaint be dismissed, and that the North Western have and recover its costs herein incurred.

Roger S. Bessey, Carl McGowan, Fred O. Steadry, Edgar Vanneman, Jr., Charles H. Dickman, 400 West Madison Street, Chicago 6, Illinois;

Edward H. Borgelt, Roger S. Bessey, 828 North Broadway, Milwaukee 2, Wisconsin, Attorneys for Chicago and North Western Railway Company, Intervening Defendant.

[fol. 296] *Duly sworn to by C. H. Dickman, jurat omitted in printing.*

[fol. 297] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

ANSWER OF INTERVENING DEFENDANT, DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY—Filed July 5, 1960

Comes now Duluth, South Shore and Atlantic Railroad Company, a corporation, hereinafter called "DSS&A", as Intervening Defendant, and as and for its Separate Answer to the Complaint filed in the above entitled action admits, denies, and alleges as follows:

I.

Admits the allegations contained in paragraphs 1 through 6 of Plaintiffs' Complaint.

II.

Admits that the extension of line constructed by Plaintiffs conforms to the general description contained in paragraph 7 of Plaintiffs' Complaint and in Appendix B to said Complaint, which was introduced in evidence before the Interstate Commerce Commission; states that it has no

information as to whether the photographs attached to Plaintiffs' Complaint as Appendix D are true and correct representations of the extension of line constructed by [fol. 298] Plaintiffs; alleges that said photographs were not introduced in evidence before the Interstate Commerce Commission and are accordingly improperly attached to Plaintiffs' Complaint; and avers that the trackage amounts to an extension of the lines of railroad of the Plaintiffs in violation of the provisions of Section 1(18)-(22) of the Interstate Commerce Act.

III.

Admits that cars are interchanged between Plaintiffs over the extension of their respective lines constituting the connecting track and alleges that as a result of the construction of said extension and the establishment of rates and routes over said extension Plaintiffs have been enabled to extend their services into territories theretofore adequately served by the DSS&A through its connection with the Milwaukee at Champion, Michigan. Except as admitted herein Defendant DSS&A denies each and every allegation contained in paragraph 8 of Plaintiffs' Complaint.

IV.

Alleges on information and belief that Plaintiffs have interchanged substantial volumes of traffic since the construction of the extension of their respective lines at Republic Junction, Michigan and that the preponderance of traffic interchanged over said extension now consists of commodities other than saw logs and chemical wood. Except to the extent the allegations contained herein admit the allegations contained in paragraph 9 of Plaintiffs' Complaint, Defendant DSS&A denies the allegations contained in paragraph 9 of Plaintiffs' Complaint.

[fol. 299] V.

Admits the existence of a statutory duty to establish through routes but denies the allegations contained in paragraph 10 of Plaintiffs' Complaint to the extent that they

allege that the statute imposes such a duty on the Plaintiffs at or near Republic, Michigan.

VI.

Denies the allegations contained in paragraph 11 of Plaintiffs' Complaint.

VII.

Admits the allegations contained in paragraph 12 of Plaintiffs' Complaint to the effect that Plaintiffs failed to procure the authority from the Interstate Commerce Commission to construct or operate said extension.

VIII.

Admits the allegations contained in paragraph 13 of Plaintiffs' Complaint.

IX.

Admits that Plaintiffs filed a joint application with the Interstate Commerce Commission for a certificate authorizing operation over said interchange tracks and that said application was docketed by the Commission as Finance Docket No. 20139 and was supplemented by an Amendment filed August 1, 1958, as described in paragraph 14 of Plaintiffs' Complaint. Defendant DSS&A is in no position to judge the motives of the Plaintiffs in filing said application and, accordingly, except as expressly admitted herein, denies each and every allegation contained in paragraph 14 of Plaintiffs' Complaint.

X.

Admits the allegations contained in paragraph 15 of Plaintiffs' Complaint.

[fol. 300]

XI.

Admits the allegations contained in paragraph 16 of Plaintiffs' Complaint and avers that said Examiner recommended that the Commission find that the Plaintiffs had

constructed and were operating the crossover track in violation of the provisions of Section 1(18)-(22) of the act and recommended that the Commission should order Plaintiffs to discontinue said violation.

XII.

Admits the allegations contained in paragraph 17 of Plaintiffs' Complaint.

XIII.

Admits the allegations contained in paragraph 18 of Plaintiffs' Complaint.

XIV.

Admits the allegations contained in paragraph 19 of Plaintiffs' Complaint.

XV.

Denies the allegations contained in paragraph 20 of Plaintiffs' Complaint and avers that, contrary to the allegations set forth therein, there was no denial on the part of the Commission to Plaintiffs of due process of law to their prejudice or damage, or otherwise; that the action of the Commission in said dockets was not arbitrary and did not involve any abuse of discretion, was in full accord with legal standards, was not in excess of statutory jurisdiction and was not in violation of the Interstate Commerce Act in any respect whatsoever, including particularly the respects enumerated in subparagraphs (a) through (e) of paragraph 20 of Plaintiffs' Complaint.

[fol. 301] Specifically in answer to said subparagraphs, Intervening Defendant DSS&A:

(a) Alleges that the finding of the Interstate Commerce Commission that said connecting interchange tracks constitute an extension of Plaintiffs respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act is fully supported by evidence of record

and denies that said finding is erroneous, unreasonable, arbitrary, capricious or constitutes an abuse of discretion.

(b) Alleges that the Interstate Commerce Commission properly concluded as a matter of law that said connection constituted an extension of Plaintiffs respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act and denies that any error of law was involved in said conclusion.

(c) Alleges that Section 1(22) of the Interstate Commerce Act has no application to the extension of lines constructed by the Plaintiffs and accordingly, denies that the Interstate Commerce Commission erred as a matter of law in concluding that said physical connection was not excluded from the requirements of Section 1(18)-1(20) and Section 5 of the Interstate Commerce Act.

(d) Alleges that the Interstate Commerce Commission properly concluded as a matter of law that Plaintiffs have constructed and are operating extensions of their respective lines of railroad in violation of Sections 1(18)-1(22) of the Interstate Commerce Act and denies that any error is involved in said conclusion.

(e) Alleges that the Interstate Commerce Commission properly ruled as a matter of law and of fact that Plaintiffs' motion to dismiss the application in Finance Docket [fol. 332] 20139 for want of jurisdiction should be denied and denies that the action of the Commission in this respect was arbitrary, capricious, unreasonable or an abuse of its discretion.

XVI.

Denies the allegations contained in paragraph 21 of Plaintiffs' Complaint. Contrary to the allegations contained in paragraph 21 of Plaintiffs' Complaint, Intervening Defendant avers the denial of Plaintiffs' application for a Certificate of Public Convenience and Necessity was fully supported by the evidence of record, that the action of the Commission was not arbitrary and did not involve any abuse of discretion; was in full accord with legal standards;

was not in excess of statutory jurisdiction nor against the weight of the evidence and was not in violation of the Interstate Commerce Act in any respect whatsoever, and including particularly the respects enumerated in subparagraphs (1) through (5) of paragraph 21.

Specifically in answer to said subparagraphs (1) through (5) Intervening Defendant DSS&A:

(1) Alleges that the finding that the present and future public convenience and necessity were not shown to require operation by the Plaintiffs of the extension of line referred to above was fully supported by substantial evidence and denies that said findings were contrary to evidence of record, unsupported by substantial evidence or arbitrary or capricious in that the record in the case fully supports each of the findings enumerated in said subparagraph (1).

(2) Alleges that the relationship of the LS&I to and its control by The Cleveland Cliffs Iron Company supported the Commission's conclusion that it would not be consistent [fol. 303] with the provisions of the Interstate Commerce Act to grant a Certificate of Public Convenience and Necessity in Finance Docket 20139 and denies that such conclusion is arbitrary, capricious or not supported by the evidence of record, or that the denial of a certificate by reason thereof is beyond the statutory powers of the Interstate Commerce Commission.

(3) Alleges that Plaintiffs had no duty under Section 1 (4) of the Interstate Commerce Act to construct an extension of their lines in violation of Sections 1(18) through 1(21) of said Act and denies that the Interstate Commerce Commission failed in any respect to give full consideration to the artificial construction of Section 1(4) of the Interstate Commerce Act urged by the Plaintiffs in these proceedings.

(4) Denies that there was any error on the part of the Interstate Commerce Commission in denying Plaintiffs application in Finance Docket 20139 under Section 1(18) or under Section 5 of the Interstate Commerce Act.

(5) Alleges that the order requiring Plaintiffs to cease and desist and abstain from maintenance and operation of

the extension of Plaintiffs lines is consistent with the Findings of Fact and Conclusions of Law in Finance Dockets 20048 and 20139 and denies that the order is in any respect unreasonable, arbitrary, capricious, or beyond the power of the Interstate Commerce Commission or unlawful.

XVII.

Alleges that the construction of the extension of the Plaintiffs' lines at Republic Junction was unlawful and that the operation over said track was not authorized. Ac- [fol. 304] cordingly, Intervening Defendant DSS&A denies the allegations contained in paragraph 22 of the Complaint that Plaintiffs have suffered any loss or damage as a result of the findings and orders of the Interstate Commerce Commission.

XVIII.

Denies the allegations contained in paragraph 23 of Plaintiffs' Complaint.

XIX.

Wherefore, Intervening Defendant DSS&A, having fully answered the allegations of the Complaint, prays that the relief sought by the Complaint be denied, that the Complaint be dismissed, and that the DSS&A have and recover its costs herein incurred.

Respectfully submitted,

Thomas M. Beckley, 1734 Soo Line Building, Minneapolis 2, Minnesota;

Reginald W. Nelson, 604 First Wisconsin National Bank Building, Milwaukee 2, Wisconsin,

Attorneys for Duluth, South Shore and Atlantic Railroad Company.

[fol. 305] *Duly sworn to by Thomas M. Beckley, jurat omitted in printing.*

[fol. 306] AFFIDAVIT OF MAILING (omitted in printing).

[fol. 308] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.

MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE—Filed May 23, 1960

Come now the Plaintiffs in this cause, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company, by their attorneys, and move this Honorable Court:

To notify the Chief Judge of this Circuit of the filing of the complaint in this cause pursuant to the provisions of Title 28 U.S.C., Section 2284, so that the Chief Judge thereupon may designate three judges, at least one of whom shall be a circuit judge, to hear and decide this suit and this motion for a preliminary injunction;

To issue a preliminary injunction in the above entitled cause restraining and suspending the operation of the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, both having been entered by said Commission in its Finance Dockets 20048 and 20139, and enjoining the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and em-[fol. 309] ployees, from enforcing said orders pending the filing of an answer, the hearing and the other proceedings

to be had herein and until the final determination of this cause of action and of all matters subsidiary and ancillary thereto in order, until then, to preserve the status quo now and heretofore existing;

To set this motion for preliminary injunction for hearing on a day certain to be fixed by this Court at the earliest practicable time in order that this motion may be heard and determined and said preliminary injunction issued prior to June 14, 1960, such day being the last on which Plaintiffs may comply with said orders of the Interstate Commerce Commission;

To enter its order against Defendants herein and against the other parties to the said proceedings before the Interstate Commerce Commission, the Duluth, South Shore and Atlantic Railroad Company and Chicago and North Western Railway Company, to show cause why a preliminary injunction should not issue from this Court pursuant to the prayer in Plaintiffs' verified complaint heretofore filed herein on the day and at the time to be fixed by this Court as aforesaid;

For such other, further or different relief as may be considered equitable in the premises.

As grounds in support of this motion, Plaintiffs show to this Court as follows:

1. Plaintiffs brought their cause of action in this Court pursuant to Title 28 U.S.C., Section 1336, and on the 17th day of May, 1960, filed their verified complaint praying that said orders of the Interstate Commerce Commission be annulled and set aside, and that a temporary restraining order and preliminary and final injunctions be [fol. 310] issued restraining the operation of said orders and enjoining their enforcement by Defendants; and on said day summonses issued and were placed in the hands of the United States Marshal for service;

2. The said orders of the Interstate Commerce Commission require Plaintiffs on or prior to June 14, 1960, to cease operating over certain interchange switching tracks connecting their respective lines of railroad at or near Republic, Michigan, by means of which connection Plaintiffs continuously since its construction have interchanged a

substantial volume of carload traffic between their respective lines of railroad;

3. Plaintiffs now receive, and continuously since the construction of said tracks have received, valuable and substantial revenues from the movement of carload traffic interchanged thereover as aforesaid;

4. Unless the operation of said orders is restrained and suspended and the enforcement thereof by the United States and the Interstate Commerce Commission enjoined, Plaintiffs will be obliged to comply as aforesaid with such orders on or prior to the 14th day of June, 1960, or subject themselves at the instance of the Defendants herein to legal action to enforce such compliance;

5. Immediate and irreparable injury, loss and damage will result to Plaintiffs by reason of their compliance with said orders in the event a preliminary injunction does not issue as aforesaid in that:

(a) Plaintiffs immediately thereupon will be unable to transport a substantial portion of such traffic as now moves, and continuously heretofore has moved, over said switching connection;

[fol. 311] (b) Plaintiffs immediately thereupon will be deprived of substantial revenues which, both now and heretofore, have accrued to them as a result of the transportation and interchange of carload traffic over said connection;

(c) Such injury and damage will be irreparable because a substantial part of such traffic will forever be lost to Plaintiffs in that upon the cessation of Plaintiffs' said operations, such traffic will begin, and thereafter continue, to move by a different mode of transportation, to wit, by motor truck and not by rail; and, further, because a substantial part of such traffic is likely to be forever lost to Plaintiffs in that the closing of said connection, even temporarily, will interrupt or permanently destroy the patterns of traffic flow and Plaintiffs' solicitation of such traffic for movement over

said connection and over Plaintiffs' other lines of railroad;

(d) In the event, therefore, that this preliminary injunction is denied, Plaintiffs, in effect, will be deprived of their right to litigate this cause of action in that, in such event and even if Plaintiffs ultimately prevail in this cause, said traffic already will have been diverted from Plaintiffs as aforesaid, and Plaintiffs expect to be unable then to recapture it or to reestablish the traffic flow now and heretofore existing;

all of which more particularly appears in Plaintiffs' verified complaint filed herein and in the affidavits attached hereto in support hereof;

[fol. 312] 6. Plaintiffs have no adequate remedy of law;

7. If this preliminary injunction be granted, the injury, if any, to Defendants herein, in the event final judgment in this cause be in their favor, will be inconsiderable.

Bernard H. Davidson, Peninsula Bank Building, Ishpeming, Michigan;

Philip H. Porter, 708 First National Bank Bldg., Madison 3, Wisconsin;

Attorneys for the Lake Superior and Ishpeming Railroad Company.

R. K. Merrill, J. J. Nagle, F. M. Long, 888 Union Station Building, Chicago 6, Illinois, Attorneys for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Rodger S. Trump, 225 E. Mason Street, The Mason Building, Milwaukee 2, Wisconsin, Attorney for Plaintiffs.

[fol. 313]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

[Title omitted]

AFFIDAVIT OF JAMES H. KLINE IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE

State of Michigan,
County of Marquette, ss.:

James H. Kline, being first duly sworn, deposes and says that he is president of Lake Superior & Ishpeming Railroad Company (LS&I), one of the plaintiffs herein; that said LS&I is a railroad engaged in interstate commerce and subject to the provisions of Part I of the Interstate Commerce Act;

That responsive to requests of shippers of forest products made during and prior to 1956 the LS&I projected a 16-mile extension of its lines eastward from their eastern terminus at Cusino, Michigan into a forest area not theretofore reached by railroad to a point known as Sunrise Landing, and that upon the authorization of a certificate of public convenience and necessity issued upon application therefor and after public hearing by the Interstate Commerce Commission, such extension of its line was constructed by the said railroad at a cost of $781,960.82.

That at the time said extension was projected and built it was contemplated by the LS&I officers that the forest products consisting of saw logs, chemical wood, and pulp wood moving out of Sunrise Landing would be delivered [fol. 314] to destinations locally on the LS&I railroad or to points on other lines of railroad via connections with the Chicago and North Western Railroad Company at Little Lake, Michigan, or via connections with the Duluth, South Shore & Atlantic Railroad Company;

That the extension was completed and operations over it commenced in October 1957, and that in May 1957, when announcement was made that the extension was to be built, receivers of large volumes of forest products located at

Iron Mountain and at Amasa, Michigan, requested the establishment of 2-line routes to such points via the line of the plaintiff, Chicago, Milwaukee, St. Paul and Pacific (Milwaukee Road) and represented to the LS&I that such a route was absolutely essential to them in order that they could receive the benefit of transit rates on inbound shipments of logs, and thus provide them with another outbound route for lumber shipments, and that unless such a route was established they would either have to find other sources of supply or divert their log traffic from Sunrise Landing to highway motor trucks, and that in either case the same would be lost to the LS&I; that this was subsequently confirmed by their sworn testimony before the Interstate Commerce Commission in its Finance Docket 20048 and 20139 involved in this proceeding.

That thereupon the LS&I management investigated the merits of such demand of shippers and being satisfied of the same the LS&I established such requested route by connecting its line with the Milwaukee Road at Republic Junction where lines of two railroads lay contiguous to each other.

That a substantial volume of logs and other forest products, comprising a large proportion of all of the traffic moving from Sunrise Landing, moves to these receivers at Iron Mountain via Republic Junction; that in 1958 such traffic totalled 2021 cars and gross revenue to the LS&I of $175,727.99 and that in 1959 1190 cars were so moved [fol. 315] with $87,492.67 gross revenue to the LS&I;

That affiant is thus informed and verily believes that if the connection with the Milwaukee at Republic Junction were broken, even temporarily, much, if not all, of the traffic described would be lost forever to the LS&I and that such loss would destroy much of the value of its investment of $781,960.82 in the Sunrise Landing extension and would result in a substantial and irreparable loss of net income to the LS&I.

That the desirability to shippers of the involved connection is further demonstrated by the development of miscellaneous traffic moved over it which is the result of shipper routing and the amount and growth of such traffic is indicated by the following:

	Cars Received by LS&I	Cars Forwarded by LS&I	Revenue Total	Revenue LS&I
1957 (2 months)	2	51	$ 10,799.07	$ 7,576.25
1958	221	905	228,564.75	82,412.11
1959	588	860	310,252.90	124,317.93
1960 (3 months)	305	295	115,249.72	44,304.56
Total	1116	2111	$664,866.44	$258,610.85

J. H. Kline

Subscribed and sworn to before me this 18th day of May, 1960, A. E. Yelland, Notary Public, Marquette County, Michigan. My commission expires November 5, 1963.

(Seal)

[fol. 316]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60 C 76

[Title omitted]

AFFIDAVIT OF C. E. CRIPPEN IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE

State of Illinois,
County of Cook, ss.:

C. E. Crippen, being first duly sworn, deposes and says:

1. That I am Assistant to the President of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road), and have personal knowledge of the facts stated herein;

2. That on or about October 21, 1957, the Milwaukee Road, in conjunction with the Lake Superior and Ishpeming Railroad Company (LS&I), constructed, and commenced

operation over, an interchange connection at or near a point known as Republic Junction, Michigan; that said connection comprises a cross-over switching track between the main tracks of the respective railroads; that two parallel interchange tracks were also concurrently constructed and connected to the main tracks of the LS&I; and that said interchange connection comprises the sole direct connec-
[fol. 317] tion of the tracks of the Milwaukee Railroad and the LS&I;

3. That for many years prior to 1957, the Milwaukee Road had directly served the plants of receivers of large volumes of forest products located at Iron Mountain and Amasa, Michigan, and had regularly transported substantial quantities of said forest products to these plants; and that the revenue from the inbound movements to these plants was very valuable to the Milwaukee Road, as was the revenue which the railroad received from the outbound movement therefrom of wood products;

4. That since the Republic Junction connection was established in 1957, the Milwaukee Road has continued to participate in substantial movements of forest products to the aforementioned receivers; that practically all these movements originated at Sunrise Landing on the LS&I and moved via the connection at Republic Junction, from which point they were handled by the Milwaukee Road to destinations at either Iron Mountain or Amasa; that said movements of forest products to these destinations account for more than one-half of the number of cars which move over the connection in both directions; that during 1959, such traffic totaled approximately 1,100 cars of chemical wood, which afforded the Milwaukee Road approximately $34,000.00 gross revenue, and approximately 200 cars of saw logs, which accounted for approximately $7,500.00 gross revenue; and that the outbound movement of finished lumber products from said saw log traffic resulted in approximately $19,000.00 gross revenue to the Milwaukee Road; and that the outbound movement of wood products manufactured from the inbound movement of chemical wood resulted in approximately $63,600.00 gross revenue to the railroad.

[fol. 318] 5. That the existence of the two-line route from Sunrise Landing via the LS&I to Republic Junction thence Milwaukee Road is necessary if said receivers at Iron Mountain and Amasa are to continue to utilize rail service for movements of saw logs from that source; that if the connection is broken, these receivers would commence to truck all their logs from the Sunrise area, or else find a different source of supply; that upon the advent of said truck movements, the Milwaukee Road would also cease to participate in the outbound movement of finished lumber products; and that these facts were confirmed by the testimony of said receivers before the Interstate Commerce Commission in its Finance Docket 20048 and 20139;

6. That it is the experience of affiant, as is the general experience of railroads, that once traffic is diverted from the railroads to the highways, it is difficult, if not impossible, for the railroads to regain such traffic, and that even by sacrificial lowering of rates it is seldom possible to regain more than a portion of the traffic once so lost;

7. That affiant is thus informed and verily believes that if the Republic Junction connection is broken the aforementioned log traffic and attendant revenues will be diverted to truck and forever lost to the Milwaukee Road as will be the outbound movements of finished lumber products and the revenues therefrom; and that the chemical wood traffic will also be lost to the Milwaukee Road;

8. That by reason of the foregoing, affiant verily believes that the Milwaukee Road will suffer irreparable loss if the Republic Junction connection of its line with that of the [fol. 319] LS&I should be closed before the above-captioned cause is determined.

C. E. Crippen

(Seal)

Subscribed and Sworn to before me this 20th day of May, 1960. Joseph S. Kopec, Notary Public.

[fol. 320]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

[Title omitted]

AFFIDAVIT OF W. W. KREMER IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE

State of Illinois,
County of Cook, ss.:

W. W. Kremer, being first duly sworn, deposes and says:

1. That I am the Vice President-Traffic of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road), and have personal knowledge of the facts stated herein;

2. That on or about October 21, 1957, the Milwaukee Road constructed, and commenced operations over, an interchange connection with the Lake Superior and Ishpeming Railroad Company (LS&I) at or near a point known as Republic Junction, Michigan; and that said interchange connection comprises the sole direct connection of the tracks of the Milwaukee Road and the LS&I;

3. That in the more than two and one-half years since the connection became available in October, 1957, the Milwaukee Road has endeavored to solicit the movement of traffic thereover; that this solicitation program, like the [fol. 321] sales efforts of any industry, involved making contacts with shippers and receivers throughout the country, informing them of the direct Milwaukee Road—LS&I routing that was created by the connection, and attempting to induce them to route traffic thereover; that said solicitation was not always successful in the first instance, but often required repeated calls upon the particular shipper or receiver; and that once having succeeded in persuading a shipper to route his traffic over the newly created route,

we were ever hopeful that we could give him the service he might want, and thereby make him a regular customer;

4. That our solicitation efforts were rewarded to some degree is evidenced by the fact that in 1959, approximately 2,370 carloads of competitive traffic, including saw logs and chemical wood, were routed over this connection, which traffic resulted in over $250,000.00 gross revenue to the Milwaukee Road; that in affiant's opinion it is impossible to measure exactly what portion of the Milwaukee Road's participation in this traffic is attributable solely to the existence of the new routing that was available because of the connection, just as it is similarly impossible to determine what portion of this traffic might have moved via the Milwaukee Road in conjunction with some other route if the connection had not been in existence; and that, although it is impossible to determine how much more traffic we have handled into and out of the Upper Peninsula of Michigan by reason of the connection which was made between the Milwaukee Road and the LS&I, it is affiant's further opinion that the Milwaukee Road's participation in traffic to and from this area has substantially increased because of the connection;

5. That if the connection is closed, even temporarily pending final determination of this cause, not only will the [fol. 322] Milwaukee Road be unable to solicit traffic over the connection, but, moreover, shippers who are now routing and heretofore have routed their traffic over said connection will of necessity immediately have to utilize other routes and establish other traffic movement patterns; and that in affiant's opinion, should the Plaintiffs then prevail in this cause and the connection thereafter be reopened, the accomplishments of our previous sales efforts will have been wiped out and we will have to start our solicitation program anew, at which time it would be difficult, if not impossible, to once again successfully regain all the traffic which presently and heretofore has been routed over the connection, for the reason that once shippers have used and become accustomed to using a certain routing, only the most compelling considerations will cause them to alter same.

6. That by reason of the foregoing, affiant verily believes that the Milwaukee Road will suffer immeasurable and irreparable injury if the Republic Junction connection of its line with that of the LS&I should be closed before the above-captioned cause is determined.

W. W. Kremer

(Seal)

Subscribed and Sworn to before me this 20th day of May, 1960. Joseph S. Kopec, Notary Public.

[fol. 323] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.

AFFIDAVIT OF A. C. STENBERG IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE—Filed June 6, 1960

State of Michigan,
County of Marquette, ss.:

A. C. Stenberg, being first duly sworn, deposes and says that he is General Traffic Manager of Duluth, South Shore and Atlantic Railroad Company (hereinafter referred to as DSS&A); that he has personal knowledge of the facts stated

herein; and that he has examined the affidavits of James H. Kline, C. E. Crippen and W. W. Kremer in support of the Motion for Preliminary Injunction and Order to Show Cause in the above entitled proceedings and makes this affidavit in answer to the statements therein contained.

That the DSS&A operates a railroad extending from Duluth, Minnesota, and Superior, Wisconsin on the west to Sault St. Marie and St. Ignace, Michigan on the east, with additional lines extending to the so-called "Copper Country" of the Upper Peninsula of Michigan, and that the DSS&A derives a large part of its revenues from the movement of forest products and other commodities mined and manufactured in the territory it serves.

That the Lake Superior and Ishpeming Railroad Company (hereinafter referred to as LS&I) operates a line of railroad substantially parallel to the lines of the DSS&A; [fol. 324] that the two roads serve in common the communities of Marquette, Ishpeming and Negaunee which are the principal cities located on the lines of the LS&I; and that elsewhere the lines of railroad of the two companies are only a few miles apart.

That the DSS&A maintains and for many years has maintained interchange facilities with the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (hereinafter referred to as Milwaukee), at Champion and Sidnaw, Michigan and that DSS&A and Milwaukee have interchanged and continue to interchange substantial volumes of traffic at each of said interchange points; that the interchange point of Champion, Michigan is located only 8 miles north of the connection of the Milwaukee and LS&I at Republic Junction, Michigan; that a large part of the miscellaneous traffic handled via Republic Junction may be routed through the interchange between the Milwaukee and the DSS&A at Champion, Michigan; and that substantially the same service is provided by the DSS&A to shippers located at points on its line which are common with the LS&I and to destinations on the LS&I through interchange with that road for shipments routed via the Champion gateway as is provided by the LS&I when the same shipments are handled via Republic Junction.

That during the one-year period from May 1959 through April 1960, the DSS&A delivered to the Milwaukee at Champion for shipment to Iron Mountain, Michigan 724 cars of chemical wood, 175 cars of logs and 156 cars of wood chips which your affiant is informed and believes were used in the making of charcoal and other products of wood distillation and finished lumber and lumber products at industries located at Iron Mountain, Michigan. That the foregoing shipments originated at the stations on the DSS&A set forth below:

[fol. 325]

Chemical Wood

Station	*No. of Cars*
Baraga	3
Champion	1
Houghton	11
Lake Linden	46
L'Anse	66
Nestoria	10
Newberry	531
Sault Ste. Marie	27
Seney	29

Saw Logs

Station	*No. of Cars*
Baraga	40
Champion	3
Lake Linden	8
L'Anse	28
Nestoria	9
Newberry	58
Seney	29

Wood Chips

Station	*No. of Cars*
Baraga	1
Lake Linden	154
L'Anse	1

That in addition during the same period the DSS&A delivered to the Milwaukee at Sidnaw, Michigan for shipment to Iron Mountain, Michigan 85 cars of chemical wood and wood chips which originated at the following named stations on the DSS&A:

Station	*No. of Cars*
Baraga	1
Covington	5
Kenton	5
Lake Linden	1
Trout Creek	72
White Pine	1

That all of the foregoing shipments moved into Iron Mountain on Milwaukee routing; that the finished products of these raw materials might be shipped out via Milwaukee to balance those shipments which might have been received from the forestry area located adjacent to the LS&I and routed into the plant at Iron Mountain via the Chicago and North Western Railway (hereinafter referred to as C&NW); and that the Milwaukee could have and in all [fol. 326] probability did participate in the outbound movement of the finished lumber products and products of wood distillation derived from the raw materials originating on the DSS&A and realized substantial revenues from said movement.

That the DSS&A has received advice from a large shipper whose timber holdings are concentrated in the area north of the DSS&A tracks and east of Munising in the Upper Peninsula of Michigan that its woods operation would start up on or about June 1, 1960 and that it had issued logging contracts covering the 6-months period beginning on June 1, 1960 providing for the movement of 44,080 tons of chemical logs (equalling approximately 1,100 cars) to be loaded on the DSS&A at Spur 81 which is near Seney, Michigan consigned to Iron Mountain and for the movement of 170 cars of saw logs to be loaded at Spur 81 for movement to Iron Mountain; that all of said movement of chemical wood and saw logs is susceptible of routing via Champion, Michigan for interchange with the Milwaukee

and delivery to Iron Mountain; and that if so moved the Milwaukee would receive the outbound movement of charcoal and wood distillation products and finished lumber which might be used as a basis for balancing any inbound shipments of chemical wood and saw logs received by the industry over LS&I-C&NW routing.

That your affiant believes that the volume of traffic scheduled to move from Spur 81 together with saw logs and chemical wood moving from other points on the line of the DSS&A, would serve to balance routings into the plant at Iron Mountain between the Milwaukee and C&NW and permit said plant to preserve its customary practice of attempting to equalize inbound and outbound movements over the lines of the Milwaukee and C&NW, both of which serve Iron Mountain, Michigan; that the Republic Junction connection is not required as a mechanism for the balanc-
[fol. 327] ing of inbound movements to the plant over the lines of the Milwaukee and the C&NW; and that the suggestion that the traffic might be diverted to truck is without foundation.

That the affidavits of W. W. Kremer, C. E. Crippen and James H. Kline show that the predominant class of traffic moving via Republic Junction in 1959 both in terms of numbers of cars handled and in revenues accruing to the Milwaukee and the LS&I consists of commodities other than forest products; that no shipper testimony was introduced at the hearing held on September 5, 1958 to indicate a need for the proposed connection for the purpose of handling such traffic; and that virtually all of said traffic represents a diversion from the DSS&A or the C&NW since the LS&I and Milwaukee had no connection between their respective lines of railroad prior to the construction of the extension of lines to effect an interchange at Republic Junction; and that the loss of this traffic by the DSS&A constitutes a serious reduction in its revenues.

That the preponderance of the traffic handled by the DSS&A along its main east-west line moves from the west to the east and that the predominant volume of the traffic which has been diverted from the DSS&A through the construction of the interchange facility at Republic Junction between the LS&I and Milwaukee moves from east to west;

that the handling of the traffic presently moving over the Republic Junction interchange by the DSS&A for interchange at Champion would result in a better balance in the movement and would require virtually no increase in train service; and that the nature of DSS&A operations is such that it is able to afford more flexibility of service to shippers and equal or better the time in transit on virtually all movements presently handled via the Republic Junction interchange.

[fol. 328] That as shown in the affidavit of James H. Kline there has been a substantial and continuing increase in the volume of miscellaneous traffic handled through the Republic Junction interchange; that the solicitation of this traffic over a two and one-half year period has resulted in substantial damage to the DSS&A in the form of reduction of revenues without any comparable reduction in expenses; and that the continuing movement of traffic over this connection which the Interstate Commerce Commission has ordered the LS&I and Milwaukee to cease, desist and abstain from maintaining and operating would result in irreparable loss to the DSS&A since it constitutes an interference with the normal traffic solicitation on the part of DSS&A among its regular shippers and receivers of freight for movement through the Champion interchange with the Milwaukee and other connections of the DSS&A.

A. C. Stenberg.

Subscribed and sworn to before me a notary public this 4th day of June, 1960. G. L. O'Neill, Notary Public, Marquette County, Michigan. My commission expires March 7, 1961.

[fol. 329] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.

AFFIDAVIT OF R. J. BARRY IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE—Filed June 6, 1960

State of Michigan,
County of Marquette, ss.:

R. J. Barry, being first duly sworn, deposes and says that he is the General Superintendent of Duluth, South Shore and Atlantic Railroad Company (hereinafter referred to as DSS&A); that he has personal knowledge of the facts stated herein; and that he has examined the affidavits of James H. Kline, C. E. Crippen and W. W. Kremer in support of the Motion for Preliminary Injunction and Order to Show Cause in the above-entitled proceedings and makes this affidavit in answer to the statements therein contained.

That the DSS&A has long been engaged in the movement of forest products in the Upper Peninsula of Michigan and has delivered to the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as Milwaukee) a large volume of saw logs and chemical wood in interchange; that according to the Annual Reports of the DSS&A to the Interstate Commerce Commission for the years 1954 through 1959 the volume of forest products originating on the DSS&A showed the following pattern:

[fol. 330] PRODUCTS OF FORESTS

	Originating and Terminating DSS&A		Originating Delivered to Connections		Total Originating	
	Cars	Tons	Cars	Tons	Cars	Tons
1954	4,134	177,421	10,802	398,877	14,936	576,298
1955	4,293	182,184	9,656	331,898	13,949	514,082
1956	5,576	241,574	11,935	441,194	17,511	682,768
1957	4,316	178,301	10,309	386,478	14,625	564,779
1958	2,055	83,544	6,588	227,067	8,643	310,611
1959	2,956	122,461	7,108	259,050	10,064	381,511

That the sharp drop in the volume of forest products handled coincided with the opening of the East Branch extension of the Lake Superior & Ishpeming Railroad Company (hereinafter referred to as LS&I) and the construction of the extension at Republic Junction; that a large part of the forest products diverted from the DSS&A in 1958 and 1959 moved over the extension at Republic Junction; and that the loss in revenue to the DSS&A on this movement of forest products alone was approximately the same amount as the figures set forth in Mr. Kline's affidavit as the earnings of the LS&I, viz:

Year	No. Cars	LS&I Proportion
1958	2021	$175,727.99
1959	1190	87,492.67

That in addition the DSS&A has lost revenues from this diversion of traffic in the last two months of 1957 and in the year 1960 to date.

That additional traffic has been diverted as shown in Mr. Kline's affidavit and that a large part of this traffic could have been handled by the DSS&A; that, to the extent disclosed in Mr. Kline's affidavit, the aggregate revenue gain of the LS&I from traffic handled over the Republic extension was:

1957 (2 months)	$ 7,576.25
1958	268,140.10
1959	211,810.60
1960 (3 months)	44,304.56
Total	$531,831.51

That throughout this period DSS&A trains have operated with less than capacity loads and could have handled said traffic for interchange with the Milwaukee at Champion, Michigan at virtually no increase in operating cost.

[fol. 331] That during the years 1955 through 1959 the gross revenue, income before fixed charges and net income after fixed and contingent charges of the DSS&A was as follows:

Year	Gross Revenue	Income Before Fixed Charges	Net Income After Fixed and Contingent Charges
1955	$7,677,757	$745,409	$421,806
1956	8,261,996	908,451	606,036
1957	7,492,543	221,888	—
1958	6,526,937	413,414	133,891
1959	6,855,765	126,212	704

That in 1957 and 1959 the DSS&A failed to earn in full its contingent interest and in fact in 1959 earned only $49,885 in contingent interest on its First Mortgage Bonds in comparison with an annual requirement of $183,000; that operating expenses have been rigidly reduced during this period and that the level of maintenance has been lowered because of the decline in revenues; that the DSS&A urgently needs additional revenues to enable it to continue to provide rail service; and that the restoration to the DSS&A of the revenues lost as a result of the construction of the Republic Extension is vital to the ability of the DSS&A to continue its operations.

R. J. Barry.

Subscribed and sworn to before me a notary public this 4th day of June, 1960.

G. L. O'Neill, Notary Public, Marquette County, Michigan. My commission expires March 7, 1961.

(Seal)

[fol. 332] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Applicants for Intervention.

MOTION FOR ORDER DENYING PRELIMINARY INJUNCTION—
Filed June 6, 1960

Comes Now the defendant and applicant for intervention, Chicago and North Western Railway Company, and by its attorneys moves the Honorable Court as follows:

To deny the motion heretofore made to have issued a preliminary injunction in the above-entitled cause restraining and suspending the operation of the order of Division 4 of Interstate Commerce Commission dated September 25, 1959 and the order of the Interstate Commerce Commission dated April 7, 1960, both having been entered by said Commission in its finance dockets 20048 and 20139, and enjoining the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, from enforcing said [fol. 333] orders pending the filing of an answer, the hearing and the other proceedings to be had herein at the instance of the plaintiffs as heretofore requested by said plaintiffs; and

To grant such other, further or different relief to this defendant and applicant for intervention as may be deemed by the Court to be just, equitable and proper in the premises.

As grounds in support of this motion for an order denying preliminary injunction as aforesaid, this defendant and applicant for intervention shows to the Court as follows:

That, on the basis of the status of the proceedings to date; because of the comparative merits and equities of the parties; because of the comparative damages to be sustained by this defendant and applicant for intervention; because of the overwhelming unlikelihood of reversal or modification of the orders of the Interstate Commerce Commission from which appeal is taken; because of the adequacy of the legal remedy available to the plaintiffs, particularly in view of the considerable and irreparable damage to this defendant and applicant for intervention, the grounds for the severe damaging equitable relief sought by the plaintiffs is completely lacking;

And, as further substantiation and grounds for motion of Chicago and North Western Railway Company, defendant and applicant for intervention, for an order denying preliminary injunction, there is attached the Affidavit of R. J. MacCarthy, General Freight Agent of the Chicago and North Western Railway Company, together with a [fol. 334] map attached thereto.

Dated this ..... day of June, 1960.

Roger S. Bessey, Carl McGowan, Fred O. Steadry, Edgar Vanneman, Jr., Charles H. Dickman, 400 West Madison Street, Chicago 6, Illinois;

Edward H. Borgelt, Roger S. Bessey, 828 North Broadway, Milwaukee 2, Wisconsin, Attorneys for Chicago and North Western Railway Company, Applicant for Intervention.

[fol. 335]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO & NORTH WESTERN RAILWAY COMPANY, Applicant for Intervention.

AFFIDAVIT OF R. J. MACCARTHY IN SUPPORT OF MOTION OF DEFENDANT, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, TO DENY PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

State of Wisconsin,
Brown County, ss.:

R. J. MacCarthy, being first duly sworn, deposes and says that:

Affiant is the General Freight Agent of the Chicago and North Western Railway Company (hereinafter called "North Western") at Green Bay, Wisconsin, and has personal knowledge of the facts stated herein.

The extension at Republic, Michigan, between the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [fol. 336] (hereinafter called "Milwaukee") and the Lake Superior and Ishpeming Railroad Company (hereinafter called "LS&I") at Republic Junction was placed in operation in October, 1957 at or about the same time at which operations were commenced over LS&I's new extension to

Sunrise Landing (hereinafter referred to as "Sunrise Extension").

The authorization for the construction of the Sunrise Extension was contained in an authorization order of the Interstate Commerce Commission dated November 28, 1956. The authorization of the Sunrise Extension, based upon the record in said proceedings, contemplated that the only two-line route between Sunrise Landing and Iron Mountain, Michigan, would be via LS&I and the North Western.

Prior to the construction of the Republic Extension, the LS&I had no track facilities for direct interchange of car load freight with the Milwaukee; however, prior to such connection, and at the present time, track facilities exist for the interchange of car load freight between the LS&I and the North Western at Negaunee, Little Lake and Ishpeming, Michigan; between the LS&I and the Soo Line at Eben Junction and Manistique, Michigan, and between the LS&I and the Lake Superior Railway Company at Doty, Michigan.

All traffic which has moved over the Republic Extension could have moved by other existing routes and over the lines of existing carriers; and affiant believes that the larger part of such traffic would have so moved if the Republican Extension had not been established; the volume of such [fol. 337] traffic which would have so moved is set forth in the affidavits of James H. Kline of the LS&I and C. E. Crippen and W. W. Kremer of the Milwaukee, heretofore entered in these proceedings.

This affiant believes that the section of the Upper Peninsula of Michigan in the vicinity of the Republic Extension was, before such extension, and in the future will be adequately served by the connections and carriers existing prior to the establishment of the Republic Extension; such view of the nature and volume of present and future rail traffic was encompassed in findings of the Interstate Commerce Commission.

Shipper support for existence of the Republic Extension was confined during Commission proceedings to two shippers who desired a route LS&I-Milwaukee via the extension at Republic for saw logs and chemical wood originating at

Sunrise Landing and terminating at Iron Mountain and Amasa. Virtually all of the logs and chemical wood moving over the Republic Extension originate at Sunrise Landing and terminate at Iron Mountain, Michigan. Such logs and chemical wood can move from Sunrise Landing to Iron Mountain, Michigan by LS&I-North Western via Little Lake on a competitive basis with traffic now moving by LS&I-Milwaukee via the Republic Extension, and the North Western is ready, willing and able to handle such traffic; and affiant believes, if the Republic Extension had not been constructed in violation of the Interstate Commerce Act, that the North Western would have participated in all of such movement as well as a large portion of other traffic now moving by said extension and the Milwaukee.

[fol. 338] Affiant believes that if the Republic Extension is discontinued little, if any, of such logs and chemical wood from Sunrise Landing to Iron Mountain would be lost to trucks, and believes that such traffic would return to the rail carriers who would have handled such traffic if said unauthorized extension had not been established. Because of the distance between Sunrise Landing and Iron Mountain, trucks would not be able to compete with the low rate afforded by the two-line route offered by the LS&I-North Western via Little Lake. Approximately two years ago the receiver of logs and chemical wood at Iron Mountain diverted a great deal of his inbound short-haul log and chemical wood traffic from rail to truck, but continued to move such traffic by rail from Sunrise Landing. Affiant believes that any threat of traffic diversion from rail to truck is inconsistent with the facts of business practicality and not warranted.

The North Western has suffered irreparable loss of log and chemical wood traffic since the Republic Extension was established; and if said unauthorized extension is not discontinued in compliance with the order of the Interstate Commerce Commission, the North Western will suffer further irreparable loss.

Affiant believes that the North Western would have carried a large portion of traffic other than logs and chemical wood if the Republic Extension had not been built and

used, and in that further regard the North Western has suffered and will continue to suffer irreparable loss if said extension is not discontinued.

[fol. 339] Affiant is informed and believes that a new iron ore processing plant is now located on the LS&I and that it will begin operations within a short time, and that a second such plant to be located on the LS&I is contemplated. Affiant believes that unless the Republic Extension is discontinued as ordered by the Interstate Commerce Commission, the North Western, as well as other rail carriers, would be precluded from sharing in traffic originating and terminating at said plant, all to the further irreparable loss and damage to the North Western and other rail carriers.

Affiant also believes that such diversion of revenue from the North Western and other existing carriers in this area could seriously impair their ability to continue to serve this area which they have been doing for long years prior to the establishment of the Republic Extension. The area is sparsely settled and not productive of lucrative traffic; such area, showing rail lines, rail connections, and certain communities is shown on the map attached hereto, said map accurately portraying the facts it purports to set forth, to affiant's own knowledge.

R. J. MacCarthy

(Seal)

Subscribed and sworn to before me this 4th day of June, 1960. Dorothy M. Parmentier, Notary Public, Brown County, Wis. My Commission expires: December 23, 1962.

[fol. 340] Clerk's Note:

Map entitled, "C. & N.W. Ry. Railroads and Interchange Points in the Upper Peninsula of Michigan—Office of the Vice President & Chief Engineer—June 3, 1960" is omitted from the record here. Please see page 277.

[fol. 341] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER TO SHOW CAUSE—May 23, 1960

Plaintiffs, having filed their verified complaint in this cause against the Defendants above named, praying, *inter alia*, for a preliminary and final injunction restraining and suspending the operation of certain orders entered by the Interstate Commerce Commission in its Finance Dockets 20048 and 20139, and on Plaintiffs' Motion for Preliminary Injunction and Order to Show Cause, supported by affidavits, and this Court having duly read and considered said complaint, motion and supporting affidavits,

It is ordered that said Defendants, the United States of America and the Interstate Commerce Commission, and such other persons as were parties to the said proceedings before the Interstate Commerce Commission, show cause before this Court, in the courtroom usually occupied by the undersigned Judge in the Federal Building at Milwaukee, Wisconsin, on Friday, the 10th day of June, 1960, at 1:45 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue in accordance with the prayer in Plaintiffs' said complaint, to-wit; restraining, suspending and enjoining the operation of the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959,

and the order of the Interstate Commerce Commission [fol. 342] dated April 7, 1960, both of which were entered in said Commission's Finance Dockets 20048 and 20139, and enjoining the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employes, from enforcing said orders pending the filing of an answer, the hearing and the other proceedings to be had herein and until the final determination of this cause and of all matters subsidiary or ancillary thereto, in order to preserve the status quo now and heretofore existing; and why Plaintiffs should not have such other further or different relief as may be considered equitable in the premises.

It is further ordered by this Court that the parties served with this Order to Show Cause and any intervening parties, shall have until not later than the 6th day of June, 1960, to serve and file any counter-motions, together with supporting affidavits in opposition.

Let a certified copy of this Order to Show Cause and a copy of Plaintiffs' Motion for Preliminary Injunction and Order to Show Cause and affidavits in support thereof be served by the Marshal upon the Defendants in this cause, the United States of America and the Interstate Commerce Commission, and upon the other parties in interest in this matter before the Interstate Commerce Commission, the Duluth, South Shore and Atlantic Railroad Company, and the Chicago and North Western Railway Company, on or before the 27th day of May, 1960.

Enter:

Robert E. Tehan

Dated this 23rd day of May, 1960.

[fol. 343] Certificate of service (omitted in printing).

[fol. 344] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Applicants for Intervention.

AFFIDAVIT OF L. C. SMITH IN REPLY TO AFFIDAVIT OF R. J. BARRY AND A. C. STENBERG WHICH WAS SUBMITTED BY INTERVENER IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION—Filed June 10, 1960

State of Wisconsin,
Milwaukee County, *ss.*:

L. C. Smith, being first duly sworn, deposes and says that he is Traffic Manager of the Lake Superior & Ishpeming Railroad, one of the plaintiffs herein;

That in reply to the allegation on page 2 of R. J. Barry's affidavit, and to the allegation on page 2 of A. C. Stenberg's affidavit "that a large part of the miscellaneous traffic handled via Republic Junction may be routed through the interchange between the Milwaukee and the DSS&A at Champion, Michigan, and that substantially the same service is provided by the DSS&A to shippers located at points on its line which are common with the LS&I and to destina-
[fol. 345] tions on the LS&I through interchange with that road for shipments routed via the Champion gateway as

is provided by the LS&I when the same shipments are handled via Republic Junction;" that during the period May, 1959 through April, 1960, a total of 881 cars were received through the Republic interchange for stations on the LS&I; that an analysis of the destination of these cars indicates the following:

437 cars of the total of 881 were consigned to the Cleveland Cliffs Iron Company at Ishpeming, Negaunee, Eagle Mills, Humboldt Mine and Republic Mine, all in Michigan. All of these points are exclusively served by the LS&I. Traffic for the Cleveland Cliffs Iron Company has never been enjoyed by the DSS&A by reason of a substantial part of LS&I stock being held by Cleveland Cliffs.

221 cars were destined to the Cliffs Dow Chemical Company of Marquette, Michigan, an industry served exclusively by the LS&I. This traffic has never been handled by the DSS&A by reason of a corporate relationship with the LS&I.

The balance of the cars, amounting to 223, were received by various consignees, all of whom are exclusively located on the LS&I and who constantly use the LS&I on their inbound shipments.

Your affiant believes that none of the 881 cars received from the Milwaukee at Republic interchange would have been handled over the DSS&A at Champion gateway under any circumstances. To do so would seriously short-haul the LS&I.

During the period May, 1959 through April, 1960, a total of 1694 cars were delivered to the Milwaukee through the Republic interchange by the LS&I. All of these cars originated at stations on the LS&I and principally consisted of logs, chemical wood, charcoal and pulpwood.

The logs and chemical wood were loaded at Sunrise Landing and moved to Iron Mountain and Amasa, Michigan, on a two-line rate, which is required to retain the [fol. 346] traffic. The charcoal, pulpwood, and shipments comprising the balance of the total originated at industries located on the LS&I and it is traditional for the originating line to enjoy the largest haul.

L. C. Smith

Subscribed and sworn to before me this 10th day of June, 1960.

C. M. Chucka, Notary Public, Milwaukee County, Wisconsin.

My Commission expires February 12, 1961.

(Seal)

[fol. 347] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Applicants for Intervention.

AFFIDAVIT OF J. H. KLINE IN REPLY TO AFFIDAVIT OF R. J. MACCARTHY WHICH WAS SUBMITTED BY INTERVENER IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION—Filed June 10, 1960

State of Wisconsin,
Milwaukee County, ss.:

James H. Kline, first being duly sworn, deposes and says that he is President of Lake Superior and Ishpeming Railroad Company, one of the plaintiffs herein;

That in reply to the allegation on page 3 of R. J. MacCarthy's affidavit that "virtually all of the logs and chemical wood moving over the Republic Extension originate at Sunrise Landing and terminate at Iron Mountain, Michigan; affiant says that a substantial portion of such traffic moves not to Iron Mountain but to Amasa, Michigan; that [fol. 348] during the period from November, 1957 to March, 1960, inclusive, a total of 232 cars so moved destined for Amasa; that such traffic yielded revenues to the L.S. & I. of $25,191.47 and to the Milwaukee Road of $9,794.29; that such traffic was not included in the previous affidavit of affiant; and that the on., two-line route open for such traffic and the only feasible and practicable routing for the movement thereof was via the connection at Republic Junction.

In answer to the averment at the foot of page 4 of the R. J. MacCarthy affidavit to the effect that the North Western would have carried a large portion of the traffic other than logs and chemical wood if the Republic Junction connection had not been built and that, therefore, it has suffered and will continue to suffer irreparable loss until such connection is closed, affiant further says that experience and the flow of traffic indicates that the movement of such other traffic via Republic Junction has not operated to diminish substantially or otherwise adversely affect the traffic of the North Western interchange with the L.S. & I.; in 1957, which was a year of unusually heavy traffic, a total of 4394 cars of general traffic was transferred with the North Western at Little Lake; in 1958, a year of sharp recession, a total of 3750 cars were so transferred; and in 1959, a year affected seriously by the steel strike, a total of 4765 cars was transferred, an increase of 8.4% over the banner year of 1957.

Affiant further says that the new iron ore processing plant referred to at the top of the last page of the R. J. MacCarthy affidavit will not go into operation until the [fol. 349] month of July of this year; that during the period of lake navigation all of the iron ore produced by said plant will move to docks for transshipment via the lakes in which the Milwaukee Road would not be involved, and that consequently none of the production of that plant

will be subject to Milwaukee Road routing until after the close of navigation on or about the first day of December, 1960 when all-rail movement of iron ore commences.

James H. Kline.

Subscribed and sworn to before me this 10th day of June, 1960.

C. M. Chucka, Notary Public, Milwaukee County, Wisconsin. My Commission expires: February 12, 1961.

(Seal)

[fol. 350] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

and

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY and CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Intervening Defendants.

PRELIMINARY INJUNCTION—June 13, 1960

This cause came on for hearing before the statutory three-judge Court convened by the Honorable John S. Hastings, Chief Judge of the United States Court of Appeals for the Seventh Circuit by designating the Honorable F. Ryan Duffy, Judge of the United States Court of Appeals for the

Seventh Circuit, and the Honorable Robert E. Tehan and Kenneth Philip Grubb, Judges of the United States District Court for the Eastern District of Wisconsin, to hear and determine this cause pursuant to Section 2284 of Title 28 of the United States Code upon the motion of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, plaintiffs in the above entitled cause, for a preliminary injunction pursuant to plaintiffs' complaint, praying a decree annulling and setting aside the order of Division 4 of the Interstate Commerce Commission dated September 25, [fol. 351] 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, both having been entered by said Commission in its Finance Dockets 20048 and 20139, and enjoining and restraining the enforcement of said orders by the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employes, upon the ground that the Interstate Commerce Commission was without jurisdiction to enter said orders or upon the ground that said orders were not in accordance with law or with the evidence, and were unreasonable, arbitrary and capricious and constituted an abuse of discretion; and upon consideration of plaintiffs' said verified complaint, plaintiffs' said motion for preliminary injunction, the affidavits of J. H. Kline, President of the Lake Superior & Ishpeming Railroad Company, C. E. Crippen, Assistant to the President, and W. W. Kromer, Vice President—Traffic, both of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in support and said motion, plaintiffs' memorandum in support of their motion for preliminary injunction, plaintiffs' proposed findings of fact and conclusions of law, the answer and the motion of the Chicago and North Western Railway Company, intervening defendant, for an order denying preliminary injunction and the affidavit of R. J. MacCarthy, General Freight Agent of the Chicago and North Western Railway Company, in support of such motion, the affidavits in opposition to motion for preliminary injunction of A. C. Stenberg, General Traffic Manager, and R. J. Barry, General Superintendent, both of the Duluth, South Shore and Atlantic Railroad Company, intervening

defendant, and the briefs of said intervening defendants; and after hearing the arguments of counsel, and it appearing that said application was duly set down for hearing at the Federal Building in Milwaukee, Wisconsin, at 2:00 p.m. o'clock on the 10th day of June, 1960, and that on or before the 27th day of May, 1960, an order to show cause [fol. 352] before the Court why a preliminary injunction should not issue in accordance with plaintiffs' said complaint and motion was entered in this cause and served upon the parties defendant hereto and said applicants for intervention, and the Court, being fully advised in the premises, hereby issues the order hereinafter set forth, based upon the following reasons:

1. The questions raised on the pleadings are meritorious in that they comprise a justiciable controversy.

2. There is a sufficient possibility that plaintiffs may prevail on the merits of this cause.

3. The status quo existing since October, 1957, should be continued in effect and the said connection should remain open pending final decision on the merits of this cause.

4. Plaintiffs will suffer substantial, immediate and irreparable injury in the event the operation and enforcement of the said orders of the Interstate Commerce Commission are not enjoined pending final decision of the merits of this action.

5. Defendants and intervening defendants will suffer less hardship in comparison with plaintiffs should such injunction issue.

6. Plaintiffs have no adequate remedy at law.

7. A preliminary injunction in accordance with the prayer of plaintiffs' complaint should issue.

Now, Therefore, It Is Hereby Ordered, adjudged and decreed that:

1. The operation of the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, both having been entered by said Commission

in its Finance Dockets 20048 and 20139, be, and the same hereby are, henceforth restrained and suspended pending the filing of an answer, the hearing and the other pro-
[fol. 353] ceedings to be had herein and until the final determination of this cause of action and of all matters subsidiary or ancillary thereto;

2. Defendants, the United States of America and the Interstate Commerce Commission, and intervening defendants, the Chicago and North Western Railway Company and the Duluth, South Shore and Atlantic Railroad Company, and each of them, their agents, attorneys, officers, servants and employes, be, and they hereby are, restrained and enjoined from directly or indirectly enforcing said orders, or either of them, against plaintiffs, or in any manner, directly or indirectly, requiring or compelling, or attempting in any manner to require or compel, plaintiffs, or either of them, to comply with said orders pending the filing of an answer, the hearing and the other proceedings to be had herein and until the final determination of this cause of action and of all matters subsidiary or ancillary thereto.

3. No security for the payment of costs or damages is deemed necessary and therefore proper as a condition for the issuance of this injunction.

Dated this 13th day of June, 1960.

By the Court

F. Ryan Duffy, Judge of the United States Court of Appeals for the Seventh Circuit.

Robert E. Tehan, Chief Judge of the United States District Court for the Eastern District of Wisconsin.

K. P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin.

[fol. 354] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

and

DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, and CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Intervening Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 14, 1960

The above entitled matter having come on for hearing on the 10th day of June, 1960, before the statutory three-judge court of the Honorable F. Ryan Duffy, Judge of the United States Court of Appeals, Seventh Circuit, the Honorable Robert E. Tehan, Chief Judge, and the Honorable K. P. Grubb, Judge, of the United States District Court for the Eastern District of Wisconsin, pursuant to plaintiffs' motion for a preliminary injunction in accordance with plaintiffs' complaint, affidavits and briefs having been filed, oral argument having been had, and the court, being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, is a corporation organized and incor-

[fol. 355] porated under the laws of the State of Wisconsin and operates, *inter alia,* in the states of Wisconsin and Michigan.

2. Plaintiff, the Lake Superior and Ishpeming Railroad Company, is a corporation organized and incorporated under the laws of the State of Michigan and operates within and through the State of Michigan.

3. Both plaintiffs are common carriers engaged in the business of transporting persons and property by railroad as common carriers, both in interstate and intrastate commerce, and both are subject to the provisions of the Interstate Commerce Act relating to such carriers by railroad.

4. In October, 1957, plaintiffs constructed, and commenced operation over, a connection between their lines of railroad near Republic, Michigan, at a point where their respective rights of way are contiguous and parallel. Plaintiffs since have interchanged carload traffic between their respective railroads via such connection from which they have received valuable and substantial revenue.

5. Prior to the construction and operation aforesaid, plaintiffs obtained no authorization therefor from the Interstate Commerce Commission, except that tariffs specifying through routes via Republic Junction were duly filed with said Commission as provided by law.

6. As a result of proceedings initiated before the Interstate Commerce Commission by petition of the Duluth, South Shore and Atlantic Railroad Company, there designated as Finance Docket 20048 and of the proceedings had before the Commission on plaintiffs' application for a certificate of public convenience and necessity under Section 1(18) of the Interstate Commerce Act, designated as Finance Docket 20139; Division 4 of the Interstate Commerce Commission on September 25, 1959, entered its Re-[fol. 356] port and Order finding that the Commission had

jurisdiction of both proceedings, that said connection is an extension of plaintiffs' lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act, and that public convenience and necessity did not require the operation of said connection and ordering plaintiffs, within 45 days of the effective date of such order, to cease and desist, and thereafter abstain from maintaining and operating said connection.

7. On plaintiffs' petition for reconsideration of said Report and Order, the full Interstate Commerce Commission entered its order denying said petition and setting April 30, 1960, as the effective date of the said order of Division 4, thus setting June 14, 1960, as the last date for plaintiffs to comply with said orders.

8. Throughout said proceedings plaintiffs alleged that said connection was within the purview of Section 1(22) of the Interstate Commerce Act exempting such tracks from the requirements of Section 1(18) thereof and, thus, that the Commission had no jurisdiction over said connection.

9. Plaintiffs filed their verified complaint in the instant cause, praying that said orders of the Commission be annulled and set aside, and that the enforcement thereof be permanently enjoined.

10. Said complaint raises the questions, (1) whether the said orders of the Commission are null and void *ab initio* in that the Commission had no jurisdiction to enter same because said connection is within the meaning of Section 1(22) of the Act and, therefore, exempt from the requirements of Section 1(18) of the Act, and (2) whether the Commission erred in finding that public convenience and necessity do not require the operation of said connection in that such findings are contrary to the evidence of [fol. 357] record, unsupported by substantial evidence, arbitrary, capricious, unlawful and beyond the statutory powers of the Commission.

11. Said complaint also prayed for a temporary injunction against the operation and enforcement of said orders pending the hearing and final determination of the merits of said cause and all matters ancillary or subsidiary thereto.

12. Unless said preliminary injunction issues as prayed for in plaintiffs' verified complaint, plaintiffs will suffer the following injury pending the filing of an answer, the hearing and the other proceedings to be had herein and until the final determination of this cause of action and of all matters subsidiary and ancillary thereto, to wit:

(a) Due to the closing of said connection, plaintiffs immediately will be deprived of a substantial portion of the carload traffic which now moves, and continuously heretofore has moved, thereover;

(b) Plaintiffs immediately will be deprived of substantial revenues which they would otherwise receive therefrom;

13. Such injury and damage will be irreparable because a substantial part of such traffic will be lost to plaintiffs; and, further, because a substantial part of such traffic is likely to be forever lost to plaintiffs in that the closing of said connection, even temporarily, will interrupt or permanently destroy the patterns of traffic flow and plaintiffs' solicitation of such traffic for movement over said connection and over plaintiffs' other lines of railroad.

14. In the event, therefore, that this preliminary injunction is denied, plaintiffs, in effect, will be deprived of their right to litigate this cause of action in that, in such event [fol. 358] and even if plaintiffs ultimately prevail in this cause, said traffic already will have been diverted from plaintiffs, and plaintiffs expect to be unable then to recapture it or to re-establish fully the traffic flow now and heretofore existing.

15. If this preliminary injunction be granted, the injury to defendants and to intervening defendants herein, in the event final judgment in this cause be in defendants' favor, will be less than that to plaintiffs should plaintiffs prevail.

16. The status quo is the now existing condition of said connection being open for the interchange of traffic as aforesaid.

Conclusions of Law

1. This Court has jurisdiction of this action, Title 28 U.S.C., Section 1336, and the cause is properly brought pursuant to and in accordance with Title 28 U.S.C., Sections 1398, 2284, 2321, 2322, 2324, and 2325, and the Administrative Procedure Act, Title 5 U.S.C., Ch. 19, Section 10.

2. Plaintiffs have exhausted their administrative remedies.

3. All parties to this cause are properly before the Court and the Court has jurisdiction over them.

4. This Court has jurisdiction to decide the merits of this cause of Action.

5. This Court has jurisdiction to enter a preliminary injunction as prayed for in plaintiffs' complaint.

6. The questions raised on the pleadings are meritorious in that they comprise a justiciable controversy.

7. There is a sufficient possibility that plaintiffs may prevail on the merits of this cause.

8. Plaintiffs have sufficient standing in equity, under [fol. 359] the circumstances of this case, to entitle them to the preliminary injunctive relief herein sought and granted.

9. The status quo existing since October, 1957 should be continued in effect and the said connection should remain open pending final decision on the merits of this cause.

10. Plaintiffs will suffer substantial, immediate, and irreparable injury in the event the operation and enforcement of the said orders of the Interstate Commerce Commission are not enjoined pending final decision of the merits of this action.

11. Defendants and intervening defendants will suffer less hardship in comparison with plaintiffs, should such injunction issue.

12. Plaintiffs have no adequate remedy at law.

13. A preliminary injunction in accordance with the prayer of plaintiffs' complaint should issue.

14. No security for the payment of costs or damages is deemed necessary and, therefore proper, as a condition for the issuance of this injunction.

Dated this 14 day of June, 1960.

By the Court

F. Ryan Duffy, Judge of the United States Court of Appeals for the Seventh Circuit.

Robert E. Tehan, Chief Judge of the United States District Court for the Eastern District of Wisconsin.

K. P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin.

Approved as to form only.

Edward G. Minor by [signature illegible], United States Attorney for defendants, United States of America and The Interstate Commerce Commission.

Reginald W. Nelson by [signature illegible], One of the attorneys for the intervening defendant, Duluth, South Shore and Atlantic Railroad Company.

Roger S. Bissey, One of the attorneys for intervening defendant, Chicago and North Western Railway Company.

[fol. 360] [File endorsement omitted]

[Handwritten notation—I. Original]

[Stamp—Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d), F.R.C.P., and Rule 21-A of District Court]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

ORDER FOLLOWING PRE-TRIAL CONFERENCE—June 20, 1960

The parties having appeared by their respective counsel at a pre-trial conference in the above matter held on June 10, 1960, following the argument of the plaintiffs' motion for preliminary injunction, and said counsel having so agreed,

It Is Ordered: That the subsequent course of this action shall be governed by the following stipulations unless modified by the court to prevent manifest injustices;

1. Not later than August 1, 1960, counsel for the plaintiffs will submit a brief to the court setting forth the theory of case relied upon and citation of authority in support of the position taken, to which counsel for the defendants and intervening defendants will respond not later than September 9, 1960. The plaintiffs' reply brief will be filed not later than September 20, 1960.

Dated, Milwaukee, Wisconsin, this 20th day of June, 1960.

F. Ryan Duffy, Judge, United States Court of Appeals for the Seventh Circuit, K. P. Grubb, U. S. District Judge, Robert E. Tehan, U. S. District Judge.

[fol. 361] [File endorsement omitted]

[Handwritten notation—Original]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al., Defendants.

MOTION TO DISMISS THAT PORTION OF THE COMPLAINT WHICH ATTACKS THE COMMISSION'S JURISDICTION, UNDER SECTION 1(18)-(22), TO ENTER A CEASE AND DESIST ORDER, AND TO SET THE REMAINING ISSUES FOR HEARING ON THE MERITS CONCURRENTLY THEREWITH—Filed October 22, 1962

The United States of America and the Interstate Commerce Commission, defendants herein, respectfully file this motion to dismiss that portion of the complaint herein which attacks the provision of the order of the Commission here under review requiring plaintiffs to cease and desist, and thereafter abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks constructed between their lines near Republic, Michigan, in violation of Section 1(18)-(22) of the Interstate Commerce Act. In addition, defendants respectfully request that the Court set the remaining issues for a hearing on the merits concurrently with the hearing on this motion.

The grounds for this motion are as follows:

1. The issue concerning the Commission's jurisdiction to enter such a cease and desist order is moot. On October 10, 1962, the entire Commission entered an order, a copy of [fol. 362] which is appended as Exhibit A, annulling, vacating and setting aside that portion of its orders entered September 25, 1959, and April 7, 1960, as modified by order dated June 17, 1960, which required plaintiffs to cease and desist the unlawful operations found to exist on or before a stated effective and compliance date. The proceeding in Finance Docket No. 20048 was ordered discontinued.

2. In view of the Commission's cancellation of the cease and desist provision, the posture of this court review proceeding is that there remains pending for judicial determination the issue whether the remaining portions of the orders of the Commission (a) denying plaintiffs' motion to dismiss their Section 1(18) application for a certificate of public convenience and necessity authorizing the construction of the tracks in question, and (b) denying the said application, are in accordance with law and supported by substantial evidence.

We respectfully request that this Honorable Court set this motion and the remaining issues in this action for oral argument on November 1, 1962.

Lee Loevinger, Assistant Attorney General;

Patrick M. Ryan, Attorney, Department of Justice, Washington 25, D. C.;

James B. Brennan, United States Attorney, Eastern District of Wisconsin, Milwaukee 1, Wisconsin,

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.,

Attorneys for the Interstate Commerce Commission.

[fol. 363] Certificate of Service (omitted in printing).

[fol. 364]

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of October, A. D., 1962.

Finance Docket No. 20048

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.

Finance Docket No. 20139

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.—OPERATIONS, ETC.

ORDER—Service Date October 15, 1962

Upon consideration of the record in the above-entitled proceedings, and it appearing that by orders entered herein on September 25, 1959 and April 7, 1960, as modified by order dated June 16, 1960 postponing the effective and compliance date until further order of the Commission, respondents were required to cease and desist, and thereafter abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks constructed between their lines near Republic, Michigan, found to constitute a violation of section 1(18)-(22) of the Interstate Commerce Act;

And it further appearing, That it has been found in other proceedings that a competent court is the only forum having jurisdiction under section 1(20) to grant relief for a violation of section 1(18), see Finance Docket No. 21559,

John McGrody, et al. v. *Baltimore & Ohio Railroad Company*, —— I.C.C. ——, (decided August 16, 1962), and other good cause appearing therefor:

[fol. 365] *It is ordered*, That the above-entitled proceedings be, and they are hereby, reopened for further consideration on our own motion;

It is further ordered, That the cease and desist provision and compliance date of the orders heretofore entered on September 25, 1959 and April 7, 1960, as modified and postponed by order dated June 16, 1960, be, and they are hereby, annulled, vacated and set aside;

And it is further ordered, That the proceeding in Finance Docket No. 20048, be, and it is hereby, discontinued and that in all other respects the orders entered herein be, and they are hereby affirmed.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 366] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al., Defendants.

REPLY TO MOTION TO DISMISS—Filed December 21, 1962

For its reply to the Motion of the United States of America and the Interstate Commerce Commission to dis-

miss that portion of the complaint which attacks the Commission's jurisdiction under Section 1(18)-(22) to enter a cease and desist order and to set the remaining issues for hearing on the merits concurrently therewith, the Soo Line Railroad Company, formerly named Duluth, South Shore and Atlantic Railroad Company, one of the defendants herein, states as follows:

I.

The cease and desist order entered by the Commission in Finance Docket No. 20048 requiring plaintiffs to cease and desist, and thereafter abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks constructed between their lines near Republic, Michigan, in violation of Section 1(18)-(22) of the Interstate Commerce Act, was entered as a result of a petition filed with the Commission pursuant to Section 13 of the Interstate Commerce Act (49 U.S.C. [fol. 367] #13) by the Duluth, South Shore and Atlantic Railroad Company on January 8, 1958. The purpose of the petition was to call the Commission's attention to the construction of a line of railroad which petitioner alleged to be in violation of Section 1(18) of the Interstate Commerce Act and to request the Commission to take such action as was within its power to require the railroad companies involved to comply with the provisions of Section 1(18) to 1(21) of the Interstate Commerce Act. The petition stated that the Interstate Commerce Commission and the public generally had an interest in the situation because of representations made to the Commission in connection with the construction of another line of railroad authorized in Finance Docket No. 16129.

In 1948 and 1949 the Lake Superior & Ishpeming Railroad Company, one of the complainants herein, constructed an extension of its line of railroad to Republic Mines, Michigan, pursuant to a certificate of public convenience and necessity granted by the Interstate Commerce Commission on September 8, 1948, in Finance Docket No. 16129. In making application for said certificate of public convenience and necessity, said Lake Superior & Ishpeming Railroad Company represented in its return to questionnaire that

it would not make any physical connections from the proposed extension with any other railroad. Said representation was incorporated in the report of the Commission in Finance Docket No. 16129.

In making application to the Interstate Commerce Commission for the construction of another extension of its line of railroad in Finance Docket 19084, the Lake Superior & Ishpeming Railroad Company represented that all of the outbound forest products originating on the proposed extension would be routed via a connecting road other than the plaintiff Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Duluth, South Shore and Atlantic Railroad Company intervened in opposition to the proposed construction in Finance Docket No. 19084. The Interstate [fol. 368] Commerce Commission granted the authority requested over the objections of the Duluth, South Shore and Atlantic Railroad Company, relying in part on the representations made by the applicant that the traffic which the line was constructed to handle was not subject to the competition of connecting lines for routing.

The construction of railroad which was the subject of the complaint in Finance Docket No. 20048 resulted in the establishment of a connection which had not been authorized by the Commission's order in Finance Docket No. 16129. This connection also opened up competitive routes contrary to the representations made by plaintiff Lake Superior & Ishpeming Railroad Company in briefs filed in Finance Docket No. 19084, on which representations the Commission purported to rely in its Report and Order in said Docket.

The purpose of the petition of the Duluth, South Shore and Atlantic Railroad Company was to call this matter to the attention of the Commission and to request it to take such action as it lawfully could pursuant to Section 1(20) of the Interstate Commerce Act. (49 U.S.C. #1(20))

In view of the fact that the Interstate Commerce Commission has denied the application for a certificate of public convenience and necessity in Finance Docket No. 20139, the Soo Line Railroad Company did not object to the vacation of the cease and desist order in Finance Docket No. 20048, and does not oppose the motion herein of the United

States of America and the Interstate Commerce Commission to dismiss that portion of the complaint which attacks the cease and desist provision of the order of the Commission. Upon dismissal of that portion of the complaint, the Soo Line Railroad Company believes that the remain-[fol. 369] ing issues should be set for oral argument at the soonest practical date.

Respectfully submitted,

Thomas M. Beckley, Charles H. Clay, 804 Soo Line Building, Minneapolis 40, Minnesota;

Reginald W. Nelson, 2100 Marine Plaza, Milwaukee 2, Wisconsin,

Attorneys for Soo Line Railroad Company.
By Reginald W. Nelson.

Certificate of Service (omitted in printing).

[fol. 370] [File endorsement omitted]

[Stamp—Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d), F.R.C.P., and Rule 21-A of District Court.]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

ORDER FOLLOWING PRE-TRIAL CONFERENCE—
December 27, 1962

The parties having appeared by their respective counsel at a pre-trial conference in the above matter held on December 27, 1962, pursuant to notice, and said counsel having so agreed,

It Is Ordered: That the subsequent course of this action shall be governed by the following stipulations unless modified by the court to prevent manifest injustices;

1. This case is scheduled for trial on February 14, 1963, at 10:00 o'clock A. M., at which time argument will also be heard on the motion of the United States of America and the Interstate Commerce Commission to dismiss portions of the complaint.

2. Not later than February 7, 1963, counsel for the parties will exchange and file with the court memoranda discussing the jurisdiction of this court to decide the re-

maining issues should the motion of the United States of [fol. 371] America, and the Interstate Commerce Commission to dismiss portions of the complaint be granted and the necessity of a determination by this court as to the propriety of that portion of the orders of the Interstate Commerce Commission involved herein requiring the plaintiffs to cease and desist operating certain tracks near Republic, Michigan.

Dated, Milwaukee, Wisconsin, this 27th day of December, 1962.

P. Ryan Duffy, Judge, United States Court of Appeals for the Seventh Circuit.

Robert E. Tehan, K. P. Grubb, U. S. District Judges.

[fol. 372] [File endorsement omitted]

[Stamp—copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) F.R.C.P., and Rule 21-A of District Court. 3/5/63.]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

—v.—

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

OPINION—March 4, 1963.

Before Duffy, Circuit Judge; Tehan, Chief Judge; and Grubb, District Judge.

Grubb, District Judge. This action is brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee Road") and the Lake Superior & Ishpeming Railroad Company (hereinafter referred to as the "Ishpeming") to set aside and permanently enjoin certain orders of the Interstate Commerce Commission (hereinafter referred to as the "Commission").

On October 21, 1957, plaintiffs, the Milwaukee Road and Ishpeming, commenced operation over a newly constructed connection between their main lines of railroad approxi- [fol. 373] mately two miles north of the town of Republic in the Upper Peninsula of Michigan, at a point where their respective rights of way are contiguous and parallel. Continuously and without interruption since that date, plaintiffs have interchanged carload traffic via that connection pursuant to tariffs filed with the Commission.

The connection itself is simply a crossover track between plaintiffs' respective railroads. It comprises two switches or turnouts, one in each of plaintiffs' lines, which are connected by 262 feet or approximately 0.05 miles of track.

In addition to the connection, two parallel interchange sidings were concurrently constructed and connected at each end, not to the connecting track but to Ishpeming's main line track. The function of the sidings is to temporarily park cars from a train of one plaintiff off the main track until they are picked up by a train of the other plaintiff and to facilitate the various movements required to interchange cars over the connection.

Pursuant to a contract between plaintiffs, the total cost of construction, amounting to approximately $28,690, was shared equally.

On January 3, 1958, the Duluth, South Shore and Atlantic Railroad Company, since renamed the Soo Line Railroad Company (hereinafter referred to as "Duluth"), complained to the Commission, alleging that such connection was an "extension" of plaintiffs' respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act, and that no certificate of public convenience and necessity had first been obtained pursuant to [fol. 374] the requirements of that section. The Duluth

requested the Commission to investigate and require compliance with Sections 1(18) to 1(21).

Plaintiffs' reply averred that the connecting track did not constitute an "extension" as contemplated by Section 1(18) but rather was a "switching track" within Section 1(22) and, therefore, that the Commission had no jurisdiction in the premises.

The pertinent provisions of the Interstate Commerce Act are set out in the footnote below.*

Plaintiffs nevertheless applied under Section 1(18) for a certificate of public convenience and necessity to operate [fol. 375] over the connection. The Chicago and North Western Railway Company (hereinafter referred to as "North Western") was permitted to intervene in opposition to plaintiffs' application. After a hearing held on

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* Title 49 U.S.C.A.

"§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *."

Par. (19) provides, among other things, that upon application for such certificate, the Commission shall give certain prescribed notices.

Par. (20) provides, among other things, that any construction or operation contrary to the provisions of paragraph (18) may be enjoined by any court of competent jurisdiction by any party in interest.

Par. (21) provides, among other things, that the Commission may authorize or require any carrier by railroad to provide itself with safe and adequate facilities and to extend its line or lines.

"§ 1, par. (22). *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, * * *."

September 5, 1958, the Examiner found that the Republic Junction connecting track constituted extensions of plaintiffs' respective lines of railroad within the meaning of Section 1(18), and further recommended that plaintiffs' application for a certificate of public convenience and necessity be granted.

On September 25, 1959, Division 4 of the Commission entered its report and order reversing the Examiner's finding that public convenience and necessity required the facility, and affirmed his finding that the connection is an extension of applicants' lines. This order denied the application for a certificate and required plaintiffs to cease and desist from maintaining and operating both the connecting crossover and the interchange sidings at Republic Junction. On April 7, 1960, the Commission entered an order denying plaintiffs' petition to reconsider its prior report and order.

On June 13, 1960, this court issued a preliminary injunction suspending the operation of the Commission's orders pending final determination of the case.

On October 10, 1962, the Commission entered an order annulling, vacating, and setting aside the cease and desist provisions of its prior orders. This action resulted when the Commission determined in another proceeding that under Section 1(20) of the Act, a competent court is the only forum having jurisdiction to grant relief for a violation of Section 1(18) of the Act.

[fol. 376] Defendants have filed a motion to dismiss that portion of the complaint which attacks the Commission's jurisdiction under Sections 1(18)-(22) to enter a cease and desist order on the ground that that issue has been rendered moot by the Commission's order of October 10, 1962. That motion is hereby granted.

Plaintiffs' complaint presents two issues for determination: (1) Whether the Commission's finding that the Republic Junction trackage constitutes an "extension" within the meaning of Section 1(18) is correct; and if so, (2) whether the order of the Commission denying a certificate of public convenience and necessity is supported by substantial evidence.

This court's jurisdiction is based upon Sections 1336, 1398, 2284, 2321, 2322, 2324, and 2325, 28 U.S.C.A.

The question of whether the trackage involved herein is an "extension" or is a Section 1(22) track is a mixed question of fact and law. *United States* v. *Idaho*, 298 U.S. 105 (1936). Although the Commission must incidentally pass on the issue of whether or not a track is an "extension" subject to its jurisdiction whenever an application under Section 1(18) is filed, the final determination of that issue is for the court. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266 (1926); *Powell* v. *United States*, 300 U.S. 276 (1937).

The principal decision relied on by the Commission is *Texas & Pacific Ry. Co.*, supra. In that landmark case, the Texas & Pacific sued under Section 1(20) to enjoin the Gulf, Colorado & Santa Fe from constructing tracks into an industrial territory adjacent to the line of the Texas & Pacific. The evidence showed that the proposed seven and [fol. 377] one-half miles of track would tap territory already adequately served by Texas & Pacific and would divert freight revenues amounting to $500,000 per year. In holding the proposed track to be an "extension" and not a "spur" or "industrial" track within Section 1(22), the court furnished a guideline as to what constitutes an "extension," stating at page 278:

> "* * * But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. * * *"

As the court points out in *State of Georgia* v. *United States*, 156 F. Supp. 711 (N. D. Ga. 1957), aff'd 356 U. S. 273 (1958), the standard laid down in the *Texas & Pacific* case is whether or not there is a *substantial* extension into *new* territory. In the *State of Georgia* decision, the court held there was a *substantial* extension because it would involve substantial expenditures ($523,916) and would run a substantial distance. The facts in that case are not applicable to the situation here. We cannot say that a connecting track 262 feet in length which cost $28,690 to build is "substantial," nor is there any "invasion" into new territory served by the intervening defendants.

No industries are located on or adjacent to the Republic Junction connecting track, and, as the Commission concedes, the movement of the cars from the line of the Mil-
[fol. 378] waukee Road to the Ishpeming, and vice versa, is a "switching movement."

The Commission found that the switching of cars from one carrier to the other permits the plaintiffs to divert traffic from the intervening defendants, the Duluth and the North Western.

Prior to the construction of the connection, there was only one two-line route connecting points on the Ishpeming with Iron Mountain and points south. That route was via the Ishpeming and the North Western. As a result of the connection, there is now an additional route between these points via the Ishpeming to Republic Junction, and then via the Milwaukee Road. The Commission also found that the connection enabled the Ishpeming to compete for traffic which might otherwise be routed via the Duluth. This results from the fact that the Ishpeming and the Duluth run through the same towns between Marquette and Duncan, Michigan. Prior to the connection, traffic between these points and points served only by the Milwaukee Road was necessarily routed via the Duluth and the Milwaukee Road which connected at Champion, Michigan. The Commission then reasons that since the connection opens up new "traffic patterns" and provides a new "through route" via the Ishpeming and the Milwaukee Road, it has an importance far out of proportion to its length.

The fact that a new "through route" is opened does not make the track an extension of plaintiffs' lines. A "through route" is an arrangement between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to a destination on the line of another. *St. Louis S. W. Ry. Co.* v. *United States*, 245 [fol. 379] U. S. 136, 139 (1917). The only condition precedent to the existence of a through route is the holding out of the two carriers to provide through transportation service. *Thompson* v. *United States*, 343 U. S. 549 (1952).

The Commission concedes that it has no authority to require carriers to obtain its consent prior to initiating new through routes, but argues that the construction of a new piece of track to enable the carriers to initiate through routes is a factor in determining whether the construction falls under Section 1(18) or Section 1(22). This argument fails to take into account the difference between a "through route" and a through movement of complete trains. There is no through movement of plaintiffs' trains over each other's lines. Neither plaintiff is operating over the line of the other. The most that can be said is that each plaintiff has physically lengthened its respective line of railroad a distance of 262 feet, the length of the crossover track. The decisions in *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244 (1926), and *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F. 2d 777 (8th Cir. 1925), cited by defendants, are inapplicable. Each of these decisions involved an extension of line to a new terminus by means of proposed trackage rights over another railroad.

With regard to the competitive situation between plaintiffs and the intervening defendants, the record shows that Sunrise Landing, Michigan, the eastern terminus of the Ishpeming, is a source of saw logs and chemical wood which is shipped to the Kingsford Chemical Company at Iron Mountain, Michigan, and to the Amasa Lumber Company at Amasa, Michigan. Both of these companies have been served by the Milwaukee Road prior to the Republic [fol. 380] Junction connection, as they are now with the connection in operation. Moreover, neither of the intervening defendants, Duluth or North Western, has ever

served Sunrise Landing. The only line serving that point is the Ishpeming. Therefore, regardless of the fact that the connection creates a new through route to reach the Amasa and Iron Mountain shippers, it cannot be said that there is an "invasion" into new territory served by the intervening defendants within the doctrine of the *Texas & Pacific* case, supra.

In *Missouri, K. & T. R. Co. of Texas* v. *Texas & N. O. R. Co.*, 172 F.2d 768 (5th Cir. 1949), it was held that the *Texas & Pacific* case did not apply where two railroads already were in competition with each other in territory to which one of them builds a new track. The switching movement over the Republic Junction connection is similar to that which existed in *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F.2d 126 (D. Kan. 1931). In that case the Union Pacific and the Chicago & Great Western Railway Company had tracks parallel to and adjoining each other. The Union Pacific sought to construct 350 feet of track connecting these two railroad lines, to be used to interchange freight originating on their respective lines and designated for points upon the other line. The proposed connection was to be used to interchange freight which formerly had been interchanged between them via the Missouri Pacific. In holding that the connecting track was not an extension under Section 1(18), the court noted at page 127:

> "It is too small a matter to require the attention of the Interstate Commerce Commission, and is undoubtedly within one of the exceptions that Congress had in mind in enacting the statute referred to."

[fol. 381] We think this statement is equally applicable to the track involved here. In addition to the fact that the connection at Republic Junction comprises a relatively insignificant length of 262 feet of track in an unpopulated, wilderness area, it should be pointed out that none of the usual factors or standards indicating that a track is an extension of a railroad line exist here.

In *New York Central Railroad Co.* v. *Chicago & Eastern Illinois Railroad Co.*, 222 F.2d 828 (7th Cir. 1955), the court held that a proposed track was an "industrial" or "spur" track within the meaning of Section 1(22). In that

decision, the Court of Appeals for the Seventh Circuit quoted with approval from *United States* v. *Idaho*, 298 U.S. 105 (1936), wherein the Supreme Court stated at pages 108-109:

> "The Oregon Short Line has never maintained a train schedule or regular service over this trackage; has never furnished express, passenger or mail service; has maintained no buildings, loading platforms or agent at any point along the trackage; and has had no telegraph or telephone line in connection therewith. * * * "

In addition, the court in the *New York Central Railroad Co.* case pointed out that no through train service with any other road would be maintained by the defendant in connection with such trackage which laid in an area of undeveloped farm land. See also *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F.Supp. 613 (E.D. Pa. 1955), wherein the court applies many of the same tests in determining whether a track is an extension of a line of railroad.

Since neither of the plaintiffs in the instant action supplies any of these services over the Republic Junction connection, and since the connection does not extend into terri- [fol. 382] tory which heretofore has been exclusively served by the intervening defendants within the doctrine of the *Texas & Pacific* case, we hold that Republic Junction connection is a "switching track" and is, therefore, excluded from the jurisdiction of the Commission.

It is a matter of common knowledge that there are many thousands of switches between lines of different railroads where they are in close proximity and over which cars are shifted from one railroad to another. It is inconceivable that Congress intended each of those to be subject to the jurisdiction of the Commission and to be an "extension" of the lines of such railroads; otherwise, there would be no point in Section 1(22) of the Interstate Commerce Act.

In view of the foregoing, we need not pass upon the second issue as to whether or not the Commission's denial of a certificate of public convenience and necessity is supported by substantial evidence.

Plaintiffs are directed to prepare a decree annulling and setting aside the orders of the Interstate Commerce Com-

mission and permanently enjoining the enforcement thereof in accordance with this decision, and are to submit it to defendants for approval as to form only.

F. Ryan Duffy, Judge, U. S. Court of Appeals for the Seventh Circuit, Robert E. Tehan, Chief Judge, U. S. District Court, Kenneth P. Grubb, U. S. District Judge.

[fol. 383] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

DECREE—June 18, 1963

This cause coming on for hearing before the statutory three-judge Court convened by the Honorable John S. Hastings, Chief Judge of the United States Court of Appeals for the Seventh Circuit, who designated the Honorable F. Ryan Duffy, Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable Robert E. Tehan and Kenneth P. Grubb, Chief Judge and Judge, respectively, of the United States District Court for the Eastern District of Wisconsin, to hear and determine this cause pursuant to Section 2284 of Title 28 of the United

States Code upon the complaint of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior and Ishpeming Railroad Company, plaintiffs in the above entitled cause, praying for a decree annulling and setting aside the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, [fol. 384] both having been entered by said Commission in its Finance Dockets 20048 and 20139, and permanently enjoining and restraining the enforcement of said orders by the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, upon the ground the Interstate Commerce Commission had no jurisdiction to enter said orders; and upon the motion of the United States of America and the Interstate Commerce Commission, defendants herein, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order forbidding further operation by plaintiffs over a certain track known as the Republic Junction connection upon the ground said portion of the complaint is moot in that said Commission has rescinded the cease and desist provisions in its said orders in accordance with its decision in other litigation; and upon consideration of plaintiffs' said verified complaint, the answers of the parties defendant herein, the briefs of the parties upon the issues raised in said pleadings defendants' said motion and the briefs and memoranda of the parties on the issues raised therein, and such other briefs and memoranda as have been filed in the cause; and it appearing said cause was duly set down for hearing at the Federal Building in Milwaukee, Wisconsin, at 10:00 a.m. o'clock on the 14th day of February, 1963; and after hearing the arguments of counsel, and the Court, being fully advised in the premises, hereby issues the decree hereinafter set forth for the following reasons:

1. The issues raised by the portions of plaintiffs' complaint attacking the jurisdiction and power of the Inter- [fol. 385] state Commerce Commission to enter the cease and desist provisions contained in paragraph 1 of its said

order of September 25, 1959, are moot in that the said paragraph 1 of said order has been annulled, vacated and set aside by order of the said Commission on October 10, 1962.

2. The connecting track between plaintiffs' respective lines of railroad at Republic Junction, Michigan, is a switching track within section 1(22) of the said Act and not an extension of the line of either plaintiff under section 1(18) of the said Act.

3. The order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, entered in its Finance Dockets 20048 and 20139, are outside the jurisdiction and beyond the statutory powers of the Interstate Commerce Commission.

Now, Therefore, in accordance with this Court's decision and opinion of March 4, 1963, wherein are set out its findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

1. That the motion of defendants, the United States of America and the Interstate Commerce Commission, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order be and the same is hereby granted.

2. That the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, be and the same are hereby annulled and set aside as void and of no effect.

3. That the United States of America, the Interstate Commerce Commission, defendants herein, and the Chicago [fol. 386] and North Western Railway Company and the Duluth, South Shore and Atlantic Railroad Company, now known as Soo Line Railroad Company, intervening defen-

dants herein, and each of them, their agents, attorneys, officers, servants and employees, be, and they hereby are, permanently restrained and enjoined from directly or indirectly enforcing the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the said Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, or either of them, against plaintiffs or requiring or compelling, or attempting in any manner to require or compel, plaintiffs, or either of them, to comply with said orders.

Dated this 18th day of June, 1963.

F. Ryan Duffy, Judge of the United States Court of Appeals for the Seventh Circuit, Robert E. Tehan, Chief Judge of the United States District Court for the Eastern District of Wisconsin, Kenneth P. Grubb, Judge of the United States District Court for the Eastern District of Wisconsin.

Approved as to form only:

United States of America, By Philip L. Padden, Asst. United States Attorney;

Interstate Commerce Commission, By Philip L. Padden, Asst. United States Attorney;

Chicago and North Western Railway Company, By Roger S. Bissey;

Soo Line Railroad Company, By Reginald W. Nelson.

[fol. 387]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD CO. and LAKE SUPERIOR AND ISHPEMING RR CO.,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.

NOTICE—June 18, 1963

Take Notice that the final decree enjoining enforcement of the Commission order was entered on June 18, 1963.

To:

Frank M. Long, III and Rodger S. Trump, Bernard H. Davidson and Philip H. Porter, Thomas M. Beckley and Reginald W. Nelson, Patrick M. Ryan and James B. Brennan, Arthur J. Cerra, Carl McGowan and Edward H. Borgelt.

Dale E. Ihlenfeldt, Clerk, United States District Court. By ..... Deputy Clerk.

[fol. 388] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants.

MOTION FOR NEW TRIAL—Filed June 21, 1963

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, The United States of America and the Interstate Commerce Commission respectfully move this Honorable Court to vacate its order, entered on June 18, 1963, on the ground that it is based upon prejudicial errors of law and fact, to wit:

(1) The Court's opinion states (p. 11); "It is a matter of common knowledge that there are many thousands of switches between lines of different railroads where they are in close proximity and over which cars are shifted from one railroad to another. It is inconceivable that Congress intended each of those to be subject to the jurisdiction of the Commission and to be an 'extension' of the lines of such railroads; otherwise, there would be no point in Section 1(22) of the Interstate Commerce Act."

This statement, unsupported by any citations, is contrary to the holdings of the Supreme Court which make it clear [fol. 389] that the Transportation Act of 1920, C. 91, 41 Stat. 456, in specific terms confers upon the Commission's exclusive power over junctions and physical connections between main lines of railroads engaged in interstate commerce. *Alabama & Vicksburg Ry. v. Jackson & Eastern Ry. Co.*, 271 U.S. 244, 248-249; *El Dorado & W. Ry. Co.* v.

Chicago, R. I. & P. Ry. Co., 5 F. 2d 777, 779; *Texas & Pacific Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 277.

The essential feature of the disputed trackage at Republic Junction is that it connects the main lines of two previously unconnected carriers and creates new traffic patterns from a territory already adequately served by other carriers. The effect is that the Republic Junction trackage permits diversion of traffic and inflicts injury upon the existing carriers which may require the curtailing or complete elimination of the injured carriers' service in sparsely populated and low density traffic areas. Thus, the public may ultimately bear the loss and this is of national concern under sections 1(18) to (22) which were added to the Interstate Commerce Act in 1920 to prevent unnecessary duplication of service.

(2) The Court's opinion states (p. 8) that " * * * The decisions in *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244 (1926), and *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F. 2d 777, (8th Cir 1925), * * * , are inapplicable. Each of these decisions involved an extension of line to a new terminus by means of proposed trackage rights over another railroad." This analysis is incorrect. While the Jackson and Eastern Railway had applied to the Commission to connect with the main line of the Alabama & Vicksburg Railway requiring joint use of its main line from that point into the City of [fol. 390] Jackson, the Supreme Court clearly noted that this application was withdrawn without hearing and no further application was made to the Commission. (271 U.S. at p. 245.) There was no proposal for trackage rights involved in that case, which this Court appears to believe is a critical requirement, but rather a connection between the main lines of previously unconnected railroad.

In the *El Dorado* case, the El Dorado & Wesson Railway proposed to cross over four tracks of the C. R. I. & P. Railway to connect with the Missouri Pacific Railroad. While the construction of track involved a direct extension from the line of the El Dorado Railway to the terminus of one of the tracks of the Missouri Pacific Railroad, a total distance of only 1,500 feet, neither the El Dorado Railway

or Missouri Pacific Railroad proposed to operate through train movements. The purpose was to operate the trackage, or cause it to be operated, for the through transportation of interstate freight and the court granted an injunction against the construction of such an extension without prior approval of the Commission.

(3) In regard to the competitive situation between the various railroads, the Court's opinion states (pp. 8-9):

> * * * the record shows that Sunrise Landing, * * * the eastern terminus of the Ishpeming, is a source of saw logs and chemical wood which is shipped to the Kingsford Chemical Company at Iron Mountain, Michigan, and to the Amasa Lumber Company at Amasa, Michigan. Both of these companies have been served by the Milwaukee Road prior to the Republic Junction connection, as they are now with the connection in operation. Moreover, neither of the intervening defendants, Duluth or North Western, has ever served Sunrise Landing. Therefore, regardless of the fact that the connection creates a new through route to reach the Amasa and Iron Mountain shippers, it cannot be said that there is an "invasion" into new territory served by the intervening defendants within the doctrine of the *Texas & Pacific* case, *supra*.

[fol. 391] This terse factual discussion by the Court is incorrect and does not support the conclusion that there is no invasion into new territory served by the intervening defendant railroads.

While the Milwaukee has always served the Iron Mountain and Amasa shippers on saw logs and chemical wood traffic from Seney,[1] both being located on its rail lines, it never had enjoyed such traffic when the logging operation moved to Sunrise Landing, 15 miles *northeast* of Seney, after the Commission authorized the construction of an extension of line of the Ishpeming Railroad to Sunrise Landing.

---

[1] Via Duluth R.R. to Champion, Mich.—Milwaukee R.R. to Iron Mt. or Amasa. Duluth R.R. to Ishpeming—NW R.R. to Iron Mt.

The report in the *Extension* case (295 I.C.C. 812) finds that none of the traffic to be transported from Sunrise Landing would be in "any material degree subject to the competition of connecting lines for its routing", thus indicating that the traffic to Iron Mt. would be interlined with one carrier, the Northwestern at Little Lake.

Thus, by the construction of the Republic Junction trackage, the competitive situation is entirely different. In rejecting the application for authority the Commission specifically found:

> • • • whereas all that traffic formerly moved over the lines of the other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. • • •

[fol. 392] In *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga., 1957) affirmed 356 U.S. 273, the court explained the teaching of the *Texas & Pacific* case, as follows:

> Thus we find that though the court finally made the test the *substantial* extension into *new territory*, much meaning was given to these words by the court's statement of the purpose of the statute. We think it clear that if the proposed construction offers a substantial threat to a "preservation of the earning capacity, and conservation to the financial resources" of either the proponent of the new trackage or of the existing carrier it may become "a matter of national concern"; if there is a substantial doubt that "the property em-

> ployed" (and this must mean the property employed by both the new and the old carriers) will "earn a reasonable return," or that it constitutes an unneeded duplication and that "the building of unnecessary (i.e., duplicating) lines involves a waste of resources" whose burden "may fall upon the public"; and if the type of competition that would result "may result in harm to the public as well as in benefit," or that the injury to its rival may cause the public ultimately to bear the loss then the Act sought, among other things, to avert such results. This is the clear teaching of the Texas & Pacific case.

Thus, although the length of line involved and the cost to construct such line are not substantial, 262 feet costing $28,690, the construction of the Republic Junction trackage enables the Milwaukee, for the first time, to compete for the traffic originating at Sunrise Landing and permits the Ishpeming to eliminate a connection and obtain more revenue via a longer haul. It is clear that the Republic Junction trackage may provide "a substantial threat to the 'preservation of the earning capacity and financial resources'" of the railroads previously enjoying the traffic. Furthermore, the trackage makes possible the "invasion" of a territory in the only sense that that phrase has any significance—carrying traffic directed to or from that territory which before completion of the disputed trackage was not and could never be handled.

[fol. 393] The fact that the trackage does not physically invade any new territory does not automatically make it a Section 1(22) track, or prevent it from being a Section 1(18) track, for as the Supreme Court pointed out in *Interstate Commerce Commission* v. *Oregon-Washington R.R.*, 288 U.S. 14, 39:

> "From what has been said it is plain that an extension, though something other than a team, switching, industrial or side track, need not, in order to be distinguished therefrom, be a building into a new and previously unserved locality."

Thus, in order for the connection at Republic Junction to be "something other than a team, switching, industrial or side track" under Section 1(22), it is not necessary for it to be "a building into a new and previously unserved locality."

Moreover, the movements of cars over the tracks at Republic Junction are part of the "actual transportation haul from the shipper to the consignee," and not, "for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul." See *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 206 F. 540. The primary purpose of the disputed trackage is to connect the lines of plaintiffs' railroads and make it possible for freight cars to pass from points on the line of one to points on the line of the other railroad. Thus the tracks at Republic Junction are "for the regular train haul in transportation proper rather than those incidental services characteristic of the tracks named as being excepted from the requirements of the Act."

More importantly, none of the cases cited by the Court involves the construction of new trackage connecting the lines of two independent railroads which would allow the previously unconnected railroads to compete for the traffic [fol. 394] of areas whose freight they could not have carried without the new tracks. This is a crucial factor in determining whether new construction falls under section 1(22) under the *Texas & Pacific* rule. Cases not having this factor in common with this case are not in point regardless of the length of the trackage or its cost of construction.

In summary, the trackage at Republic Junction constitutes part of a regular rail line for traffic moving between points on previously unconnected railroads and enables plaintiffs to divert traffic which would otherwise have traveled over the lines of other railroads. Such diversion is not limited to saw logs and chemical wood but may encompass any commodity moving in the area of light traffic density and cannot help but be reflected in the earnings of the lines sustaining the loss of traffic and, as the Commission found, might well affect their ability to continue to provide as adequate a service in the area as previously provided. Existing carriers rendering an adequate service should be protected and strengthened against wasteful com-

petition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public.

We submit, contrary to the Court's statement that it is too small a matter to require the attention of this Commission, the matter in question is of national concern. The Court should grant this Motion for New Trial, set aside its judgment entered June 18, 1963, and find that the Republic Junction Trackage constitutes an extension of line of railroad within the provisions of section 1(18) of the Interstate [fol. 395] Commerce Act and sustain the Commission orders here under attack as rational, supported by substantial evidence, and in accordance with law.

Respectfully submitted,

William H. Orrick, Jr., Assistant Attorney General;

Patrick M. Ryan, Attorney, Department of Justice, Washington 25, D. C.;

James B. Brennan, United States Attorney, Milwaukee, Wisconsin,

Attorneys for the United States of America.

Robert W. Ginnane, General Counsel;

Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.,

Attorneys for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 396] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTHWESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

MOTION OF SOO LINE RAILROAD COMPANY FOR NEW TRIAL —Filed June 28, 1963

Pursuant to Rule 59 of the Federal Rules of Civil Procedure, the Soo Line Railroad Company (formerly Duluth, South Shore and Atlantic Railroad Company) respectfully moves this Honorable Court to vacate its order, entered on June 18, 1963, on the ground that it is based upon prejudicial errors of law and facts as specifically set forth in the motion for new trial of the United States of America and the Interstate Commerce Commission served on parties of record June 20, 1963. In addition to the prejudicial errors of law and fact set forth in said motion, the Soo Line Railroad Company further alleges that the order of the Court herein is erroneous in that it is contrary to the settled administrative construction of Section 1(18) of the Interstate Commerce Commission Act (49 USC 1(19)). Since the decision of the Court in *Alabama and Vicksburg Ry. Co.* v. *Jacksonville Ry. Co.*, 271 U.S. 244 (1926), the Interstate Commerce Commission has consistently exercised its jurisdiction in determining whether connections be-

tween two main lines of a railroad should be constructed or [fol. 397] abandoned. Illustrations of situations where the Interstate Commerce Commission has exercised this authority are fully set forth at pages 4 through 13 of the brief of the Chicago and North Western Railroad Company and the Soo Line Railroad Company (then known as Duluth, South Shore and Atlantic Railroad Company) filed on September 19, 1960. Established administrative interpretations are entitled to great weight. *U.S.* v. *Public Utilities Commission,* 345 U.S. 295, 315; *Maintenance Employees* v. *U.S.,* 366 U.S. 169, 175.

Wherefore, it is respectfully requested that the Court grant this motion for new trial, that it set aside its judgment entered June 18, 1963 and find that the Republic Junction trackage constitutes an extension of line of railroad within the provision of Section 1(18) of the Interstate Commerce Act and sustain the Commission's orders here under attack as rational, supported by substantial evidence and in accordance with law.

Respectfully submitted,

Charles H. Clay, 804 Soo Line Building, Minneapolis 40, Minnesota;

Reginald W. Nelson, 2100 Marine Plaza, Milwaukee 2, Wisconsin,

Attorneys for Soo Line Railroad Company, formerly Duluth, South Shore and Atlantic Railroad Company.

Certificate of Service (omitted in printing).

[fol. 398] [File endorsement omitted]

[Stamp—Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d), F.R.C.P., and Rule 21-A of District Court.]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTHWESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

ORDER DENYING MOTIONS TO VACATE ORDER AND FOR NEW TRIAL—August 30, 1963

The court having considered the motions of Soo Line Railroad Company, Chicago and North Western Railway Company, and the United States of America and Interstate Commerce Commission for vacation of the order entered June 18, 1963, and for a new trial, and the briefs filed with respect thereto,

Now, Therefore, It Is Hereby Ordered: That the said motions of Soo Line Railroad Company, Chicago and North Western Railway Company, and the United States of America and Interstate Commerce Commission for vacation of the Order entered on June 18, 1963, and for a new trial, be and they are hereby denied.

Dated, this 30th day of August, 1963.

F. Ryan Duffy, Judge, Court of Appeals for the Seventh Circuit, Robert E. Tehan, Chief Judge, U. S. District Court, K. P. Grubb, Judge, U. S. District Court.

[fol. 399] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, Plaintiffs,

vs,

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY and DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, Intervening Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 29, 1963

1. Notice is hereby given that Chicago and North Western Railway, defendant in the above action, hereby appeals to the Supreme Court of the United States from the order entered on August 30, 1963 denying motions to vacate its order of June 18, 1963, enjoining and annulling an order of the Interstate Commerce Commission. This appeal is taken pursuant to 28 U.S.C. 1253.

2. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

a) The Complaint of the plaintiff herein (including Appendices A through F);

b) The Joint Answer of the United States of America and the Interstate Commerce Commission;

c) The Answer of Intervening Defendant Chicago and North Western Railway Company;

d) The Answer of Intervening Defendant Duluth, South Shore and Atlantic Railroad Company;

[fol. 400]

e) Motion of Plaintiff for Preliminary Injunction and Order to Show Cause (including affidavits of James H. Kline, C. E. Crippen and W. W. Kremer in support of said motions);

f) Affidavits of A. C. Stenberg and R. J. Barry in opposition to said motion;

g) Motion for Order Denying Preliminary Injunction (including affidavit of R. J. MacCarthy in support of said motion and map attached thereto;

h) Order to Show Cause dated May 23, 1960;

i) Affidavits of L. C. Smith and J. H. Kline in reply to affidavits opposing preliminary injunction;

j) Preliminary Injunction dated June 13, 1960, accompanied by findings of fact and conclusions of law dated June 14, 1960;

k) Order following pre-trial conference dated June 20, 1960;

l) Motion of United States and Interstate Commerce Commission to dismiss portion of Complaint attacking I.C.C. jurisdiction under Section 1(18)-(22) (including order in Finance Docket No. 20048, dated Oct. 15, 1962);

m) Reply by Plaintiff to Motion to Dismiss;

n) Order following pre-trial conference dated Dec. 27, 1962;

o) The Record of Proceedings before the Interstate Commerce Commission from complaint to issuance of the order enjoined herein, as certified to this Court by the Secretary of the Commission;

p) Opinion of the Court dated March 4, 1963;

q) Final Decree enjoining enforcement of order entered June 18, 1963;

r) Motion of United States and Interstate Commerce Commission for New Trial dated June 20, 1963;

s) Motion of Soo Line Railroad Company for New Trial dated June 28, 1963;

t) Order denying motions to vacate order and for new trial dated Aug. 30, 1963;

u) This Notice of Appeal to the Supreme Court of the United States by defendant Chicago and North Western Railway Company.

[fol. 401] 3. The following questions are presented by this appeal, involving review in the District Court of an order of the Interstate Commerce Commission. The Commission had affirmatively held that public convenience and necessity did not permit interconnection of the main lines of two Class I railroads at "Republic Junction," since it foresaw as a result of this interconnection potential preferences in divisions, car supply and other concessions to the most important shipper in the area, the sole owner of one of these railroads.

a) Did the District Court exceed its function by holding this subject "too small a matter to require the attention of the Interstate Commerce Commission?"

b) Where the Commission, consistent with all administrative and judicial precedent, found the unauthorized interconnection would cause detrimental injury to existing carriers and the general public, was the District Court authorized to ignore the Commission's ruling on public convenience and necessity and itself determine the effect upon commerce of this interconnection *de minimis*?

c) After a reasoned ruling by the Commission that its jurisdiction extended to the new interconnection, did the District Court exceed the permissible scope of review in holding that it, not the Commission, was finally responsible for plenary determination of that issue?

John C. Danielson, Attorney for Chicago and North Western Railway Company, 616—400 W. Madison Street, Chicago, Illinois 60606.

[fol. 402] Proof of Service (omitted in printing).

[fol. 403] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 404]

SUPREME COURT OF THE UNITED STATES

No. 710, October Term, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, et al.

ORDER NOTING PROBABLE JURISDICTION—March 9, 1964

Appeal from the United States District Court for the Eastern District of Wisconsin.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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Cases Cited

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TEXTS CITED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court is reported at 214 F. Supp. 244, and is set forth as Appendix A to this Statement. The report of the Interstate Commerce Commission is printed at 307 ICC 311 and is reproduced as Appendix D to this Statement. The Proposed Report by the Interstate Commerce Commission Examiner, which is unreported, is reproduced as Appendix C to this Statement.

JURISDICTION

This action was brought under 28 U.S.C. 1336 by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to set aside an order of the Interstate Commerce Commission. The decree of the three-judge court (Appendix B *infra*)

was entered on June 18, 1963, and the Chicago and North Western Railway Company ("North Western"), an intervening defendant in the district proceedings, after denial of its motion to vacate the decree on August 30, 1963, filed its notice of appeal in the district court on October 28, 1963.

The jurisdiction of this Court to review the judgment of the district court on direct appeal is confirmed by 28 USC 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 and *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173.

STATUTES INVOLVED

The pertinent portions of Sections 1(18), 1(19), 1(20), 1(21), and 1(22) of the Interstate Commerce Act (49 USC 1(18-22) and are set forth in the margin of Appendix A, page 17.

QUESTION PRESENTED

After the Interstate Commerce Commission had affirmatively held that public convenience and necessity did not permit interconnection of the main lines of two Class I railroads at "Republic Junction," since it foresaw as a result of this interconnection potential preferences in divisions, car supply and other concessions to the most important shipper in the area, principal owner of one of those railroads, and certain harm by way of traffic diversion to existing railroads (Appendix D, pages 64-67) did the District Court exceed its function on review by examining the issue of I.C.C. jurisdiction *de novo* and by holding this subject "too small a matter to require the attention of the Interstate Commerce Commission?"

STATEMENT

In 1957 appellees Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee") and Lake Superior and Ishpeming Railroad Company ("Ishpeming") commenced construction of a connecting track called "Republic Junction" in the upper peninsula of Michigan. It was completed, and operations commenced over Republic Junction on October 21, 1957, creating the first physical interconnection which had ever been established between the two carriers (Appendix D, page 45).

Both Milwaukee and Ishpeming are Class I common carrier railroads, but Ishpeming is in addition the controlled subsidiary of Cleveland Cliffs Iron Co., seller of the predominant part of the saw logs and chemical wood which are the principal goods shipped over Republic Junction (Appendix D, pages 50-63), and arguably the most important shipper of all goods in the entire upper peninsula (Appendix D, page 64).

On the complaint of Duluth, South Shore & Atlantic Railroad Company (now Soo Line Railroad Company, Appendix A, page 16) I.C.C. investigated to see if Milwaukee and Ishpeming had violated Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18), set out at Appendix A, page 17, in the margin of the lower court's opinion). The Hearing Examiner found that they had and recommended that both carriers be prosecuted (Appendix C, page 36). Division 4 of I.C.C. affirmed the violation and ordered Milwaukee and Ishpeming to cease and desist,[1] finding the interconnection incompatible with the public interest which

1. On October 10, 1962 I.C.C. determined that it had no power to enter the cease and desist order, and it withdrew that action herein. The lower court declared that portion of this case moot (Appendix A, page 18), correctly, we contend.

I.C.C. was charged to protect (Appendix D, pages 64-67). Thus, since September 25, 1959 (the date of I.C.C.'s final order herein), Republic Junction should have been abandoned. Nevertheless, operations over that line continue, pursuant to injunctions entered below.

The three-judge court entered a preliminary injunction against effectiveness of the I.C.C. order on June 14, 1960; then after two pre-trial conferences, and several rounds of affidavits it received briefs and heard oral argument, finally enjoining the I.C.C. order on the merits some three years later, on June 18, 1963 (Appendix B, pages 25-28).

Thus Milwaukee and Ishpeming have actually been operating for over six years (since October 21, 1957, as shown by Appendix A, page 15) under the injunctions below, an operation for which the I.C.C. Examiner recommended that they be prosecuted (Appendix C, page 36) and which the I.C.C. affirmatively found was definitely not required by the public interest (Appendix D, pages 65-67) and in violation of Section 1(18).

THE QUESTION IS SUBSTANTIAL

Under Section 1(18) of the Interstate Commerce Act a railroad may not extend or abandon any of its line without a finding by I.C.C. that public convenience and necessity permit that action. If the carrier attempts such action without I.C.C. authority, the district courts are empowered by injunction to compel a carrier to seek Commission approval *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266. In doing so, the court is required to determine in the first instance whether the action proposed by the carrier constitutes an "extension," under the teaching of *Texas & Pacific, supra.* The carrier may, of course, voluntarily seek I.C.C. authority, as Milwaukee and Ishpeming did here, in

which case it is the duty of I.C.C. to determine affirmatively its jurisdiction over the transaction. *Yonkers* v. *United States*, 320 U.S. 685. The question then presented is what weight should a reviewing court accord I.C.C.'s finding of jurisdiction? The court below held that I.C.C.'s determination was incidental (Appendix A, page 19) and tried the issue *de novo*.

This is a constantly recurring problem, very basic to many orders of the I.C.C.: what is its jurisdiction to deal with cases involving the expansion or retrenchment of regulated transportation systems? Very frankly, there exist two incompatible lines of decisions by this Court, one holding that the issue of I.C.C. jurisdiction over extension or abandonment of rail line is a "mixed question of law and fact," susceptible of *de novo* determination in a reviewing court;[2] the second, and more recent, line of cases holds that I.C.C. must determine its jurisdiction in a case involving railroad expansion or contraction,[3] and that this I.C.C. determination is entitled to presumptive weight on review, which review is limited to testing the adequacy and sufficiency of the I.C.C. findings.[4] The former line of these decisions, we submit, must be excised from present day doctrine in the interest of conserving judicial and administrative resources and establishing some semblance of harmonious interplay between the courts and regulatory agencies whose activities they review. The court below followed the former line of cases, determining *de novo* the

2. *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

3. *Yonkers* v. *United States*, 320 U.S. 685.

4. *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177; *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D.Ill. 1962), aff'd. 373 U.S. 378; *Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 531 (S.D. N.Y. 1944), aff'd. 323 U.S. 675.

issue of I.C.C. jurisdiction over the rail construction in issue, a holding incompatible with the more recent and, we submit, better reasoned decisions of this Court.

Both *Powell*[5] and *Idaho*,[6] supra, plainly hold that I.C.C. has no power to determine its jurisdiction over a proposed extension or abandonment, that instead this is "a mixed question of fact and law" upon which the court, not the Commission, must speak. Both cases involved review of I.C.C. determinations, and in both the jurisdictional issue was determined *de novo*.

But this "law-fact" formula was long ago discarded,[7] and the *Powell-Idaho* doctrine, we submit, cannot be held to have survived the *Yonkers* case, for the Court there made it plain that an I.C.C. order under Section 1(18) could not be sustained without an express finding by the agency that it had jurisdiction over the line in question. The decision is unequivocal, the Court declaring (320 U.S. at 689, 691-692) that:

> ". . . we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission."
>
> • • •
>
> "The insistence that the Commission made these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of

5. 300 U.S. 276 at 287-288.

6. 298 U.S. 105 at 109.

7. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *United States* v. *Drum*, 368 U.S. 370, 376; 4 Davis, *Administrative Law Treatise* §§ 30.01-30.11.

> an expert judgment on a knotty phase of a technical subject."
>
> • • •
>
> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Unless, to paraphrase Mr. Justice Frankfurter, "[t]he agency is made to serve as a circumlocution office,"[8] the *Yonkers* decision is positively repugnant to the *Powell-Idaho* formula. Indeed, more recent decisions point clearly toward acknowledging the Commission's role in such determinations by limiting review of these "jurisdictional" fact findings to the review normally accorded administrative agencies. Clearly in point on this precise issue is *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, where I.C.C. had determined that the subject carrier was not within the "interurban" exemption of Section 152, Eighth of 45 U.S.C., and thus subject to federal regulation of its employment practices. After the three-judge district court had tried the jurisdictional issue *de novo*, this Court reversed, holding that it had exceeded the permissible scope of review of the I.C.C. order. Unambiguous, indeed, is this decision (305 U.S. at 184-185):

> "What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions

8. *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 518 (Frankfurter, J., dissenting, joined by Justices Burton and Harlan).

with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho*, 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (id., p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U.S. 541, 547; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 91; *Virginian Railway Co.* v. *United States*, 272 U.S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 444; *Florida* v. *United States*, 292 U.S. 1, 12; *St. Joseph Stock Yards Co.* v. *United States*, *supra*.

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission. [footnotes omitted]."

* * *

"We conclude that the District Court erred in permitting a trial *de novo* of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint."

A significant number of three-judge district courts have now been persuaded that this Court meant what it said in *Yonkers,* and that since an I.C.C. finding of jurisdiction is mandatory in a 1(18) case, it should be accorded the weight on review which is customarily accorded administrative determinations. Most recently, in *State of Illinois* v. *United States* 373 U.S. 378, the Court affirmed summarily the decision of a three-judge court which, following *Yonkers,* had held (213 F. Supp. 83 at 88) that:

> "The opinion [in *United States* v. *Idaho,* 298 U.S. 105] by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.
>
> In *City of Yonkers* v. *United States,* 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a 'mixed question of fact and law,' the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance of the Commission's findings, the Court said at pages 691-692, 64 S.Ct. at pages 330-331:
>
> > 'It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domain. • • • The insistence that the Commission make these jurisdictional findings be-

> fore it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safe-guarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*
>
> • • •
>
> 'This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.' (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, *Public Service Commission of New York* v. *United States, D.C.*, 56 F.Supp. 351, and on review the Supreme Court sustained, 323 U.S. 675, 65 S.Ct. 130, 89 L.Ed. 548 (1944). The Court stated at page 675, 65 S.Ct. at page 130:

> 'On remand of the case • • • to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.'

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized [emphasis supplied]."

That the district court in *Yonkers* likewise so understood the Court's remand opinion is clear from its second opinion on review of the second I.C.C. order, *sub nom. Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed *per curiam* 323 U.S. 675. The district court read the *Yonkers* opinion as entitling the I.C.C. jurisdictional finding to "at least prima facie weight."[9]

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9. At page 353 of 56 F. Supp. the Court explained that:

"In the light of these previous proceedings, the crucial question before us is, of course, the jurisdiction of the Commission to enter the abandonment order."

• • •

"Such findings, both subordinate and ultimate, surely meet the criticisms of the previous order by the Supreme Court; and, since they were the express objective of the Supreme Court's order of reversal, they must be entitled to at least prima facie weight in our considerations here.

Actually, the effect to be given by the courts to administrative findings of 'jurisdictional facts' is not clear, as, indeed, the majority and minority opinions rendered by the Supreme Court in the present proceedings show."

• • •

"Where, as here, a court is asked to review an order of the Commission issued upon application for a certificate of public convenience and necessity under §1(18), the initial validity of which is premised upon the existence of basic jurisdictional findings by the Commission, there must of necessity be some amelioration of the doctrine that the question of jurisdiction is for the independent judgment of the court. Otherwise it would hardly have been necessary to return the case for such findings. Indeed, in the light of at least some precedents, we were coming to think that review of 'jurisdictional' and 'constitutional' facts was more limited than had earlier been thought. *Gray* v. *Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301; *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; *St. Joseph Stock Yards Co.* v. *United*

That these cases are not unique aberrations in this Court's doctrine of judicial review is revealed by its decision in *United States v. Jones*, 336 U.S. 641, 664, where it alludes to *Shields*, the keystone of our contention, as foundation for "the general rule which gives administrative determinations in such matters presumptive weight (336 U.S. at 664)." This rule, we contend, should have been applied here, where I.C.C. twice ruled affirmatively upon its jurisdiction over the extended line[10] only to have its efforts sloughed off as "incidental".

The Commission has not infrequently been criticized here for obscure reasoning, most recently in *Chicago & E. I. R. Co.* v. *United States*, 375 U.S. ..., ..., 32 U.S. Law Week 3202-3204 (Black, J., dissenting, joined by Mr. Justice Douglas) and *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654. To tell the agency, as did the three-judge court below, that its very thorough findings are simply an incidental step prior to *de novo* determination in a reviewing court, will certainly not assist in achieving the effective administrative expressions so often sought here. This, we

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States, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033; *Steamship Terminal Operating Co.* v. *Schwartz*, 2 Cir., 140 F.2d 7; Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899, 925; Landis, The Administrative Process, 1938, 126-135; 41 Yale L.J. 1037; 46 Harv. L. Rev. 478; 80 U. of Pa. L. Rev. 1055; 22 Corn.L.Q. 515."

Significantly, as we have noted, this decision was affirmed per curiam. *Public Service Com'n. of New York* v. *United States*, 323 U.S. 675.

10. Appendix D, pages 46-50 (Divisio 4); Appendix C, pages 33-36 (Examiner's Proposed Report). I deed, so clear was this issue to the Examiner, that he recomm ded that the matter be referred to the appropriate U.S. Attorn to prosecute Milwaukee and Ishpeming for failure to obtain a proval for this operation (Appendix C, page 36).

submit, is the vice of the opinion below. This also, we submit, is the inevitable result of this Court's failure, so far, to clearly overrule the gutted rule of *Powell* and *Idaho*, which the lower court obviously felt it was following faithfully.

CONCLUSION

The law of judicial review of agency action, it is clear, emanates ultimately only from this Court. *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 274, 477-490; *Attorney General's Manual on the Administrative Procedure Act*, page 109 (1947); *United States* v. *Pierce Auto Lines*, 327 U.S. 515. As we have shown[11] the lower courts have been in doubt on this point at least since 1944, and their decisions, relying upon expressions by this Court which have never been overruled, are in utter conflict.

For these reasons, we submit, this appeal should be considered upon the merits, and the law once and for all made clear, by reversing the decision below.

Respectfully submitted,

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December, 1963

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11. Footnote 9, page 11, *supra*.

APPENDIX A

In the United States District Court for the Eastern District of Wisconsin

March 4, 1963.

Civil Action No. 60-C-76.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROADS, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY AND DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, INTERVENING DEFENDANTS.

Before DUFFY, *Circuit Judge*, TEHAN, *Chief Judge*, and GRUBB, *District Judge*.

GRUBB, *District Judge:*

This action is brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee Road") and the Lake Superior & Ishpeming Railroad Company (hereinafter referred to as the "Ishpeming") to set aside and permanently enjoin certain orders of the Interstate Commerce Commission (hereinafter referred to as the "Commission").

On October 21, 1957, plaintiffs, the Milwaukee Road and Ishpeming, commenced operation over a newly constructed connection between their main lines of railroad approximately two miles north of the town of Republic in the Upper Peninsula of Michigan, at a point where their respective rights of way are contiguous and parallel. Con-

tinuously and without interruption since that date, plaintiffs have interchanged carload traffic via that connection pursuant to tariffs filed with the Commission.

The connection itself is simply a cross-over track between plaintiffs' respective railroads. It comprises two switches or turnouts, one in each of plaintiffs' lines, which are connected by 262 feet or approximately 0.05 miles of track.

In addition to the connection, two parallel interchange sidings were concurrently constructed and connected at each end, not to the connecting track but to Ishpeming's main line track. The function of the sidings is to temporarily park cars from a train of one plaintiff off the main track until they are picked up by a train of the other plaintiff and to facilitate the various movements required to interchange cars over the connection.

Pursuant to a contract between plaintiffs, the total cost of construction, amounting to approximately $28,690, was shared equally.

On January 3, 1958 the Duluth, South Shore and Atlantic railroad Company, since renamed the Soo Line Railroad Company (hereinafter referred to as "Duluth"), complained to the Commission, alleging that such connection was an "extension" of plaintiffs' respective lines of railroad within the meaning of Section 1(18) of the Interstate Commerce Act, and that no certificate of public convenience and necessity had first been obtained pursuant to the requirements of that section. The Duluth requested the Commission to investigate and require compliance with Sections 1(18) to 1(21).

Plaintiffs' reply averred that the connecting track did not constitute an "extension" as contemplated by Section 1 (18) but rather was a "switching track" within Section 1(22) and, therefore, that the Commission had no jurisdiction in the premises.

The pertinent provisions of the Interstate Commerce Act are set out in the footnote below.*

Plaintiffs nevertheless applied under Section 1(18) for a certificate of public convenience and necessity to operate over the connection. The Chicago and North Western Railway Company (hereinafter referred to as "North Western") was permitted to intervene in opposition to plaintiffs' application. After a hearing held on September 5, 1958, the Examiner found that the Republic Junction

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* Title 49 U.S.C.A.

"§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, • • •."

Par. (19) provides, among other things, that upon application for such certificate, the Commission shall give certain prescribed notices.

Par. (20) provides, among other things, that any construction or operation contrary to the provisions of paragraph (18) may be enjoined by any court of competent jurisdiction by any party in interest.

Par (21) provides, among other things, that the Commission may authorize or require any carrier by railroad to provide itself with safe and adequate facilities and to extend its line or lines.

"§ 1, par. (22). *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State. • • •."

connecting track constituted extensions of plaintiffs' respective lines of railroad within the meaning of Section 1(18), and further recommended that plaintiffs' application for a certificate of public convenience and necessity be granted.

On September 25, 1959, Division 4 of the Commission entered its report and order reversing the Examiner's finding that public convenience and necessity required the facility, and affirmed his finding that the connection is an extension of applicants' lines. This order denied the application for a certificate and required plaintiffs to cease and desist from maintaining and operating both the connecting crossover and the interchange sidings at Republic Junction. On April 7, 1960, the Commission entered an order denying plaintiffs' petition to reconsider its prior report and order.

On June 13, 1960, this court issued a preliminary injunction suspending the operation of the Commission's orders pending final determination of the case.

On October 10, 1962, the Commission entered an order annulling, vacating, and setting aside the cease and desist provisions of its prior orders. This action resulted when the Commission determined in another proceeding that under Section 1(20) of the Act, a competent court is the only forum having jurisdiction to grant relief for a violation of Section 1(18) of the Act.

[1] Defendants have filed a motion to dismiss that portion of the complaint which attacks the Commission's jurisdiction under Sections 1(18)-(22) to enter a cease and desist order on the ground that that issue has been rendered moot by the Commission's order of October 10, 1962. That motion is hereby granted.

Plaintiffs' complaint presents two issues for determination: (1) Whether the Commission's finding that the Republic Junction trackage constitutes an "extension" within the meaning of Section 1(18) is correct; and if so, (2) whether the order of the Commission denying a certificate

of public convenience and necessity is supported by substantial evidence.

This court's jurisdiction is based upon Sections 1336, 1398, 2284, 2321, 2322, 2324, and 2325, 28 U.S.C.A.

[2] The question of whether the trackage involved herein is an "extension" or is a Section 1(22) track is a mixed question of fact and law. United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936). Although the Commission must incidentally pass on the issue of whether or not a track is an "extension" subject to its jurisdiction whenever an application under Section 1(18) is filed, the final determination of that issue is for the court. Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578 (1926); Powell v. United States, 300 U.S. 276, 57 S.Ct. 470, 81 L.Ed. 643 (1937).

The principal decision relied on by the Commission is Texas & Pacific Ry. Co., supra. In that landmark case, the Texas & Pacific sued under Section 1(20) to enjoin the Gulf, Colorado & Santa Fe from constructing tracks into an industrial territory adjacent to the line of the Texas & Pacific. The evidence showed that the proposed seven and one-half miles of track would tap territory already adequately served by Texas & Pacific and would divert freight revenues amounting to $500,000 per year. In holding the proposed track to be an "extension" and not a "spur" or "industrial" track within Section 1(22), the court furnished a guideline as to what constitutes an "extension," stating at page 278, 46 S.Ct. at page 266:

> "* * * But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the estab-

> dishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. * * *"

As the court points out in State of Georgia v. United States, 156 F.Supp. 711 (N.D.Ga. 1957), aff'd 356 U.S. 273, 78 S.Ct. 771, 2 L.Ed.2d 760 (1958), the standard laid down in the Texas & Pacific case is whether or not there is a *substantial* extension into *new* territory. In the State of Georgia decision, the court held there was a *substantial* extension because it would involve substantial expenditures ($523,916) and would run a substantial distance. The facts in that case are not applicable to the situation here. We cannot say that a connecting track 262 feet in length which cost $29,690 to build is "substantial," nor is there any "invasion" into new territory served by the intervening defendants.

No industries are located on or adjacent to the Republic Junction connecting track, and, as the Commission concedes, the movements of the cars from the line of the Milwaukee Road to the Ishpeming, and vice versa, is a "switching movement."

The Commission found that the switching of cars from one carrier to the other permits the plaintiffs to divert traffic from the intervening defendants, the Duluth and the North Western.

Prior to the construction of the connection, there was only one two-line route connecting points on the Ishpeming with Iron Mountain and points south. That route was via the Ishpeming and the North Western. As a result of the connection, there is now an additional route between these

points via the Ishpeming to Republic Junction, and then via the Milwaukee Road. The Commission also found that the connection enabled the Ishpeming to compete for traffic which might otherwise be routed via the Duluth. This results from the fact that the Ishpeming and the Duluth run through the same towns between Marquette and Duncan, Michigan. Prior to the connection, traffic between these points and points served only by the Milwaukee Road was necessarily routed via the Duluth and the Milwaukee Road which connected at Champion, Michigan. The Commission then reasons that since the connection opens up new "traffic patterns" and provides a new "through route" via the Ishpeming and the Milwaukee Road, it has an importance far out of proportion to its length.

[3, 4] The fact that a new "through route" is opened does not make the track an extension of plaintiffs' lines. A "through route" is an arrangement between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to a destination on the line of another. St. Louis S. W. Ry. Co. v. United States, 245 U.S. 136, 38 S.Ct. 49, 62 L.Ed. 199 (1917). The only condition precedent to the existence of a through route is the holding out of the two carriers to provide through transportation service. Thompson v. United States, 343 U.S. 549, 72 S.Ct. 978, 96 L.Ed. 1134 (1952).

The Commission concedes that it has no authority to require carriers to obtain its consent prior to initiating new through routes, but argues that the construction of a new piece of track to enable the carriers to initiate through routes is a factor in determining whether the construction falls under Section 1(18) or Section 1(22). This argument fails to take into account the difference between a "through route" and a through movement of complete trains. There is no through movement of plaintiffs' trains over each other's lines. Neither plaintiff is operating over the line of

the other. The most that can be said is that each plaintiff has physically lengthened its respective line of railroad a distance of 262 feet, the length of the crossover track. The decisions in Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co., 271 U.S. 244, 46 S.Ct. 535, 70 L.Ed. 928 (1926), and El Dorado & W. Ry. Co. v. Chicago R. I. & P. Ry. Co., 5 F.2d 777 (8th Cir. 1925), cited by defendants, are inapplicable. Each of these decisions involved an extension of line to a new terminus by means of proposed trackage rights over another railroad.

With regard to the competitive situation between plaintiffs and the intervening defendants, the record shows that Sunrise Landing, Michigan, the eastern terminus of the Ishpeming, is a source of saw logs and chemical wood which is shipped to the Kingsford Chemical Company at Iron Michigan, Michigan, and to the Amasa Lumber Company at Amasa, Michigan. Both of these companies have been served by the Milwaukee Road prior to the Republic Junction connection, as they are now with the connection in operation. Moreover, neither of the intervening defendants, Duluth or North Western, has ever served Sunrise Landing. The only line serving that point is the Ishpeming. Therefore, regardless of the fact that the connection creates a new through route to reach the Amasa and Iron Mountain shippers, it cannot be said that there is an "invasion" into new territory served by the intervening defendants within the doctrine of the Texas & Pacific case, supra.

In Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co., 172 F.2d 768 (5th Cir. 1949), it was held that the Texas & Pacific case did not apply where two railroads already were in competition with each other in territory to which one of them builds a new track. The switching movement over the Republic Junction connection is similar to that which existed in Missouri Pac. R. Co. v. Union Pac. Ry. Co., 60 F.2 126 (D.Kan.1931). In that case the Union Pacific and

the Chicago & Great Western Railway Company had tracks parallel to and adjoining each other. The Union Pacific sought to construct 350 feet of track connecting these two railroad lines, to be used to interchange freight originating on their respective lines and designated for points upon the other line. The proposed connection was to be used to interchange freight which formerly had been interchanged between them via the Missouri Pacific. In holding that the connecting track was not an extension under Section 1(18), the court noted at page 127:

> "It is too small a matter to require the attention of the Interstate Commerce Commission, and is undoubtedly within one of the exceptions that Congress had in mind in enacting the statute referred to."

We think this statement is equally applicable to the track involved here. In addition to the fact that the connection at Republic Junction comprises a relatively insignificant length of 262 feet of track in an unpopulated, wilderness area, it should be pointed out that none of the usual factors or standards indicating that a track is an extension of a railroad line exist here.

In New York Central Railroad Co. v. Chicago & Eastern Illinois Railroad Co., 222 F.2d 828 (7th Cir. 1955), the court held that a proposed track was an "industrial" or "spur" track within the meaning of Section 1(22). In that decision, the Court of Appeals for the Seventh Circuit quoted with approval from United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936), wherein the Supreme Court stated at pages 108-109, 56 S.Ct. at pages 691, 692:

> "The Oregon Short Line has never maintained a train schedule or regular service over this trackage; has never furnished express, passenger or mail service; has maintained no buildings, loading platforms or agent at any point along the trackage; and has had

no telegraph or telephone line in connection therewith. * * *"

In addition, the court in the New York Central Railroad Co. case pointed out that no through train service with any other road would be maintained by the defendant in connection with such trackage which laid in an area of undeveloped farm land. See also Pennsylvania Railroad Co. v. Reading Company, 132 F. Supp. 616 (E.D.Pa.1955), wherein the court applies many of the same tests in determining whether a track is an extension of a line of railroad.

[5] Since neither of the plaintiffs in the instant action supplies any of these services over the Republic Junction connection, and since the connection does not extend into territory which heretofore has been exclusively served by the intervening defendants within the doctrine of the Texas & Pacific case, we hold that Republic Junction connection, is a "switching track" and is, therefore, excluded from the jurisdiction of the Commission.

It is a matter of common knowledge that there are many thousands of switches between lines of different railroads where they are in close proximity and over which cars are shifted from one railroad to another. It is inconceivable that Congress intended each of those to be subject to the jurisdiction of the Commission and to be an "extension" of the lines of such railroads; otherwise, there would be no point in Section 1(22) of the Interstate Commerce Act.

In view of the foregoing, we need not pass upon the second issue as to whether or not the Commission's denial of a certificate of public convenience and necessity is supported by substantial evidence.

Plaintiffs are directed to prepare a decree annulling and setting aside the orders of the Interstate Commerce Commission and permanently enjoining the enforcement thereof in accordance with this decision, and are to submit it to defendants for approval as to form only.

APPENDIX B

In the United States District Court for the Eastern District of Wisconsin

Civil Action No. 60-C-76

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY AND DULUTH, SOUTH SHORE AND ATLANTIC RAILROAD COMPANY, INTERVENING DEFENDANTS.

DECREE

This cause coming on for hearing before the statutory three-judge Court convened by the Honorable JOHN S. HASTINGS, Chief Judge of the United States Court of Appeals for the Seventh Circuit, who designated the Honorable F. RYAN DUFFY, Judge of the United States Court of Appeals for the Seventh Circuit, and the Honorable ROBERT E. TEHAN and KENNETH P. GRUBB, Chief Judge and Judge, respectively, of the United States District Court for the Eastern District of Wisconsin, to hear and determine this cause pursuant to Section 2284 of Title 28 of the United States Code upon the complaint of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior and Ishpeming Railroad Company, plaintiffs in the above entitled cause, praying for a decree annulling and setting aside the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commis-

sion dated April 7, 1960, both having been entered by said Commission in its Finance Dockets 20048 and 20139, and permanently enjoining and restraining the enforcement of said orders by the United States of America and the Interstate Commerce Commission, and each of them, their agents, attorneys, officers, servants and employees, upon the ground the Interstate Commerce Commission had no jurisdiction to enter said orders; and upon the motion of the United States of America and the Interstate Commerce Commission, defendants herein, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order forbidding further operation by plaintiffs over a certain track known as the Republic Junction connection upon the ground said portion of the complaint is moot in that said Commission has rescinded the cease and desist provisions in its said orders in accordance with its decision in other litigation; and upon consideration of plaintiffs' said verified complaint, the answers of the parties defendant herein, the briefs of the parties upon the issues raised in said pleadings, defendants' said motion and the briefs and memoranda of the parties on the issues raised therein, and such other briefs and memoranda as have been filed in the cause; and it appearing said cause was duly set down for hearing at the Federal Building in Milwaukee, Wisconsin, at 10:00 a.m. o'clock on the 14th day of February, 1963; and after hearing the arguments of counsel, and the Court, being fully advised in the premises, hereby issues the decree hereinafter set forth for the following reasons:

1. The issues raised by the portions of plaintiffs' complaint attacking the jurisdiction and power of the Interstate Commerce Commission to enter the cease and desist provisions contained in paragraph 1 of its said order of September 25, 1959, are moot in that the said paragraph 1 of said order has been annulled, vacated and set aside by order of the said Commission on October 10, 1962.

2. The connecting track between plaintiffs' respective lines of railroad at Republic Junction, Michigan, is a switching track within section 1(22) of the said Act and not an extension of the line of either plaintiff under section 1(18) of the said Act.

3. The order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, entered in its Finance Dockets 20048 and 20139, are outside the jurisdiction and beyond the statutory powers of the Interstate Commerce Commission.

NOW, THEREFORE, in accordance with this Court's decision and opinion of March 4, 1963, wherein are set out its findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

1. That the motion of defendants, the United States of America and the Interstate Commerce Commission, to dismiss those portions of the complaint which attack the Commission's jurisdiction, under section 1(18)-(22), to enter a cease and desist order be and the same is hereby granted.

2. That the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the Interstate Commerce Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, be and the same are hereby annulled and set aside as void and of no effect.

3. That the United States of America, the Interstate Commerce Commission, defendants herein, and the Chicago and North Western Railway Company and the Duluth, South Shore and Atlantic Railroad Company, now known as Soo Line Railroad Company, intervening defendants herein, and each of them, their agents, attorneys, officers, servants and employees, be, and they hereby are, perma-

nently restrained and enjoined from directly or indirectly enforcing the order of Division 4 of the Interstate Commerce Commission dated September 25, 1959, and the order of the said Commission dated April 7, 1960, as modified by the Commission's order dated October 10, 1962, and entered by said Commission in its Finance Dockets 20048 and 20139, or either of them, against plaintiffs or requiring or compelling, or attempting in any manner to require or compel, plaintiffs, or either of them, to comply with said orders.

Dated this 18th day of June, 1963.

/s/ F. Ryan Duffy
F. Ryan Duffy
Judge of the United States Court of Appeals for the Seventh Circuit

/s/ Robert E. Tehan
Robert E. Tehan
Chief Judge of the United States District Court for the Eastern District of Wisconsin

/s/ Kenneth P. Grubb
Kenneth P. Grubb
Judge of the United States District Court for the Eastern District of Wisconsin

APPENDIX C

Interstate Commerce Commission

Finance Docket No. 20048

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

Decided.....

Recommended that division 4 find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act, and order the defendants to terminate such violation.

(2) That the above-described violation of the act should be referred to the United States Attorney with request that prosecution be undertaken under the penal provisions of the act and jurisdiction of the proceeding retained.

(3) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of a connecting track and interchange tracks near Republic, Mich.

Henry S. Mitchell and *Thomas M. Beckley* for Duluth, South Shore and Atlantic Railroad Company.

R. K. Merrill, J. J. Nagle, L. S. Hamilton and *F. M. Long* for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Bernard H. Davidson and *Philip H. Porter* for Lake Superior & Ishpeming Railroad Company.

C. H. Dickman and *Edgar Vanneman, Jr.* for Chicago and North Western Railway Company.

REPORT[1] PROPOSED BY JOHN L. BRADFORD, HEARING EXAMINER

On January 8, 1958, the Duluth, South Shore and Atlantic Railroad Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, hereinafter referred to as complainant or Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to Part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as Milwaukee and Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich., in violation of the provisions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation. In answer to the complaint filed February 13, 1958, by Milwaukee, and February 14, 1958, by Ishpeming, defendants admit that they have constructed and are operating the tracks specified in the complaint but contend that they are not violating the provisions of the act inasmuch as such tracks are "switching tracks" within the purview of the exemption provided in section 1(22). They also stated that if there is any doubt about the matter they would file an application for appropriate authority. Such application under section 1(18) was filed on March 27, 1958, and a supplemental application under section 5(2) was filed on

[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, et al.

August 1, 1958. On April 9, 1958, applicants filed a motion to dismiss their application under section 1, which motion was subsequently made applicable to their application under section 5, on the ground that the tracks involved are "switching tracks" and therefore excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, applications, and the motion for dismissal of the applications were assigned for hearing on a consolidated record and a hearing was held on September 5, 1958. The applications were amended at the hearing. Briefs have been filed. No representations have been made by State authorit[illegible] Complainant and the Chicago and North Western Railway Company hereinafter referred to as Northwestern have been permitted to intervene in the application cases. Unless otherwise specified all points mentioned herein are in Michigan.

Description of the project.—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wisc., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee located in Michigan connected only at Champion with Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad, and at Iron Mountain with the line of the Northwestern extending between Escanaba and Ashland, Wisc.; and Ishpeming's line, so far as here material, connected at Marquette with Duluth's line, and at Little River with Northwestern's line extending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of 262 feet of crossover track between

the main lines of the Milwaukee and Ishpeming of which 148 feet are owned by the former and 114 feet by the latter; a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both turnouts are owned by the latter and 902 feet by the Milwaukee; and a track 1,746 feet in length parallel and adjacent to and turning out of the last described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs establishing through routes and joint rates on various commodities over their lines via this crossover track which are now in effect.

The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., Republic at 10:45 p.m. and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., Republic at 12:40 a.m. and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound train is scheduled to arrive at the cross-over track, hereinafter called Republic Junction, at 10 a.m. and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over

track 2 or the Ishpeming's main line whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown and the engine then moves backwards over the crossover track and on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train, and proceeds to Channing. The Ishpeming's trains are operated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of section 1(18) and 5(2) and the complaint and applications here considered should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18) and the motion to dismiss the applications should be denied.

As heretofore stated, applicants contend that the tracks involved herein are switching tracks. They assert that the tracks are used merely to switch cars from one line to the other and that they are not used for the movement of trains. In one sense they are right. The operation has all of the characteristics of a switching movement. But it is more than that. It is a means for obtaining traffic which, but for the connection, would move over other routes consisting of lines of other carriers. As stated by the United States Supreme Court in *Atlantic Coast Lines* v. *Riverside Mills*, 219 U.S. 186, 198, "through this method (the making of through routes) a situation has been brought about by which though independently managed, connecting carriers become in effect one system".

Applicants cite a number of prior decisions by this Commission and by the courts in support of their contention that the tracks involved are merely "switching tracks". Practically all of the cases relied on, however, are either not in point or they have, in effect, been overruled in subsequent decisions. All of the cited cases decided by this Commission involve applications for trackage rights over existing lines and the facts definitely establish that only switching operations were involved. In *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F.2d 126, the court refused to enjoin the construction of a track crossing the line of the Missouri Pacific and directly connecting the lines of the Union Pacific and the Chicago Great Western which was in lieu of another connecting track between their lines which had been acquired by the Missouri Pacific and the connection broken. The court held that in these circumstances the new track was a "switching track", exempt from certificate requirements of the act by section 1(22). No appeal was taken from this decision and it became the law of the case in proceedings before State courts, also relied upon by applicants. Those cases, however, should not be considered as controlling the decision here, because the facts involved are different. In those cases an existing connection was broken through action of the Missouri Pacific and the construction was for the purpose of reestablishing the connection. Here there was no connection between defendants lines until the one involved herein was built.

The defendants attempt to distinguish a number of court cases holding that a certificate from this Commission authorizing the construction of tracks connecting two railroads is required before such tracks can be constructed on the ground that they involved the construction of a track which one or both railroads opposed. Applicants apparently concede that a certificate of public convenience and necessity must be obtained from this Commission before two railroads can be forced to provide a connecting track,

but they contend that the certificate would be issued under the provisions of section 3(4) and section 15(3). There is no merit in this contention. Sections 3(4) and 15(3) do not provide for the issuance of certificates and the Commission cannot compel the construction of connecting tracks thereunder. The provisions of the act enabling the Commission to issue orders requiring the construction of connecting tracks are found in section 1(21). See *City of Milwaukee* v. *Chicago & N. W. Ry. Co.*, 283 I.C.C. 311. That section provides that "The Commission may * * * authorize or require by order any carrier by railroad subject to this part (Part I) * * * to extend its line or lines. But the provisions of section 1(22) are also applicable to the provisions of section 1(21). Accordingly, if a track connecting two railroads is merely a "switching track", the Commission has no jurisdiction to require its construction. However, the courts, with the exception of *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co., supra,* and this Commission, have uniformly held that such connecting track constitutes an extension of line within the meaning of section 1(18)-(21) and not excepted from those provisions by the provisions of section 1(22). *Alabama & V. R. Co.* v. *Jackson & E. R. Co.*, 271 U.S. 244, *People* v. *Public Service Commission*, 233 N.Y. 113, *Pipestone* v. *Chicago M. & St. P. Ry. Co.*, 213 N.W. 534, *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d. 777, *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 and *Great Southwest Railroad Inc. et al. Construction, Etc.*, ... I.C.C. ... (not printed in full), decided June 3, 1958. In the circumstances the Commission should find that the tracks involved herein constitute extensions of the lines of the defendants which lawfully cannot be constructed or operated without first obtaining an appropriate certificate from this Commission. Since defendants have admitted that they have constructed and are operating the tracks without obtaining such certificate, it follows that they are violating the provisions of

section 1(18)-(22) and division 4 should so find, and order defendants to discontinue the violation. Division 4 should also refer this matter to the United States Attorney pursuant to section 12(1) of the act with a request that prosecution be undertaken under the penal provisions of the act.

Since the tracks have been built, it would serve no useful purpose to order their removal without first considering whether they are required by the present or future public convenience and necessity. As previously stated, the tracks were constructed in the fall of 1957, and operations thereover were instituted by the applicants on October 21 of that year. Between that date and June 30, 1958, applicants interchanged at Republic Junction, a total of 1,756 carload shipments of which 1,629 originated at points located on Ishpeming's line and terminated at points on Milwaukee's line; 50 originated on Ishpeming's line and terminated at points beyond Milwaukee's line; 51 originated on the Milwaukee and terminated on the Ishpeming; and 26 originated at points beyond the Milwaukee and terminated on the Ishpeming. Of the 1,629 shipments originating on the Ishpeming and delivered on the Milwaukee, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. As seen these two commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of the traffic delivered by the Ishpeming to the Milwaukee.

Two shipper witnesses testified in support of the applications. A company engaged at Iron Mountain, in the manufacture and sale of hardwood lumber, juvenile furniture, and charcoal, buys about 90 percent of its supply of saw logs for the manufacture of lumber and a much smaller percentage of its supply of chemical logs for the manufacture of charcoal from the Cleveland Cliffs Iron Company. These logs are shipped at consignee's direction from Sunrise Landing on the Ishpeming's road, and the saw logs are moved under so-called manufacture and reshipping

rates, Iron Mountain is served by the Northwestern and the Milwaukee and the plant of this shipper is located on the latter's road. A witness representing the shipper testified that it shipped lumber over both lines and accordingly, in order to receive the benefit of the manufacture and reshipping rates it was necessary to bring in its supply of saw logs over both lines. The routes available to the shipper for this purpose are (1) Ishpeming's road to Little Lake and the Northwestern's line to Antoine where shipments are delivered to the Milwaukee for reciprocal switching to the plant, and (2) Ishpeming's road to Republic Junction and Milwaukee's line to the plant. The latter route involves the lesser time in transit and the consignee is able to receive more definite information on the progress of its shipments. During the summer months, time in transit is important because lumber is subject to stain if manufactured much more than 10 days after the logs are cut. This manufacturer receives between 20 and 30 carloads of saw logs per week.

This company obtains its supply of chemical logs from several sources and more than 50 percent of its shipments are brought in by trucks. This commodity moves on a relatively low rate and routes involving more than a two-line haul are prohibitive. The shipments of chemical logs do not move on transit rates but the shipper divides the traffic between the Milwaukee and the Northwestern as delivering carriers. Both roads have cars available to supplement Ishpeming's car supply when needed.

Another manufacturer of hardwood lumber located at Amasa on the line of the Milwaukee also utilizes applicant's services for the delivery of shipments of saw logs from Sunrise Landing. This shipper also moves its shipments under manufacture and reshipping rates and any other route from this origin would involve a three-line haul at a rate which would be prohibitive. This company receives approximately 200 car-loads of logs per year from

this source and it utilizes truck services from other sources to obtain more than one-half of its log supply. Its witness testified that his company would not be able to utilize Sunrise Landing as an origin point for saw logs if the route through Republic Junction is broken.

The Northwestern contends that it has been adversely affected by the establishment of the Milwaukee-Ishpeming connection and that a grant of the authority sought would merely aggravate this situation. It believes that the chemical and saw logs from Sunrise Landing now moving over the route through Republic Junction would be diverted to its line over the route through Little Lake in the event authority for the former route is not granted. Its witness testified concerning its service between Sunrise Landing and Iron Mountain via Little Lake and the revenues produced by the movement of logs over this route. The distance from Little Lake to Iron Mountain via the Northwestern's line is 92 miles and its scheduled service over this route provides for second morning deliveries. Its witness was aware of a few instances when actual service was somewhat slower than scheduled service. It also appears that the Northwestern's portions of revenues from the movement of minimum shipments of chemical logs and saw logs from Sunrise Landing to Iron Mountain are $35.00 and $51.30 per carload, respectively. These shipments generally move in cars owned by the Ishpeming, and in such instances the Northwestern is required to pay, out of its portion of the revenue (1) per diem charges for cars while they are on its line, (2) a switching charge to the Milwaukee amounting to $9.30 per car, and (3) a per diem reclaim to the Milwaukee of $8.94 per car. Obviously, after payment of these expenses, there remains very little revenue to pay the expense of moving the traffic 92 miles from Little Lake to Iron Mountain.

As previously stated, the interchange tracks at Republic Junction were placed in operation in October 1957. An

exhibit of record shows that during the next 8 months the Ishpeming received 985 carloads of traffic from the Northwestern at Little Lake and only 91 carloads from the Milwaukee at Republic Junction and, excluding saw and chemical logs, it forwarded 1,508 carloads over the Northwestern at Little Lake and only 236 carloads over the Milwaukee at Republic Junction. While the Milwaukee's movement of logs during this period was practically double that of the Northwestern, the exhibit shows that the Northwestern's movement was more than double the amount moved during the next proceeding corresponding period. The record clearly shows that the establishment of the considered connection has diverted little, if any, traffic from the line of the Northwestern.

Duluth, like Northwestern, fears that traffic it is presently handling will be diverted to the new routes via Republic Junction. It presented an exhibit showing that during the year from November 1, 1956 to October 31, 1957, preceding the opening of the new routes, it handled through interchange with the Milwaukee at Champion, 795 carload shipments which, it claims, could have been moved over the new routes if they had been in existence. Of this traffic, 235 shipments moved to or from Ishpeming, 428 shipments moved to or from Marquette, and the remainder moved to or from Negaunee and points on Ishpeming's road not served by Duluth. Similar data for the period prior to the hearing during which the new routes were in existence were not presented for the record. The exhibit shows that 76 different commodities or classes thereof were handled during this period of which only 19 moved in quantities of 10 or more carloads. The latter consisted of 165 carloads of fuel oil, 134 carloads of charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. An exhibit presented by

the applicants shows that they handled no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard or rosin via Republic Junction during the period from October 21, 1957, to June 30, 1958, both inclusive, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 roofing, 4 flooring, 3 tractors and 2 scrap iron. Other commodities which moved over applicants' lines via Republic Junction during this period in quantities in excess of 10 carloads consisted of 984 shipments of chemical wood, 545 of saw logs, 102 of charcoal, 29 ore, 22 sawdust, and 14 paper. Of the last-mentioned commodities, Duluth did not transport any shipments of chemical wood, saw logs or ore during the period covered by its exhibit. It appears, therefore, that applicants' service via Republic Junction is competitive with that of Duluth via Champion, principally with respect to the transportation of charcoal, sawdust and paper, but the record does not show which of these routes is the more convenient for this traffic.

Section 1(4) of the act provides that it shall be the duty of every common carrier by railroad to establish reasonable through routes with other such carriers and provide reasonable facilities for operating such routes. No one has seriously questioned the reasonableness of the through routes via Republic Junction, established by the applicants. The record shows that by far the larger portion of the traffic moving over these routes consist of shipments of saw logs and chemical wood moving from points on the Ishpeming's road to Iron Mountain and that Northwestern is the only other carrier having a competitive rate for this traffic. The shipper of saw logs at Iron Mountain needs service over both routes in order to balance inbound shipments of saw logs with outbound shipments of lumber in connection with applicable manufacture and reshipping rates. Also a shipper of saw logs at Amasa needs appli-

cants' joint service because there is no other competitive route for its traffic. Division 4 should find that operation of the crossover and interchange tracks involved herein is required by the present and future public convenience and necessity.

There remains for consideration, the disposition of the supplemental application filed under section 5 of the act. Obviously, after each applicant obtains authority to operate over the portions of the crossover track and interchange tracks belonging to them, their individual operations over those portions of the tracks belonging to the other company and the Milwaukee's operation over a portion of Duluth's main line north of the crossover is merely a switching movement which is exempt from the provisions of section 5 by the provisions of section 1(18). This application should be dismissed.

RECOMMENDED FINDINGS

Division 4 should find:

(1) That the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Lake Superior & Ishpeming Railroad Company have constructed and are operating at Republic Junction, Mich., a crossover track between their respective lines of railroad and two interchange tracks, in violation of the provisions of section 1(18)-(22) of the act; and order said carriers to discontinue said violation.

(2) That the present and future public convenience and necessity require operation by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company of the crossover and interchange tracks constructed by these carriers at Republic Junction, Mich.

(3) That the supplemental application filed under section 5 of the act should be dismissed.

An appropriate order and certificate should be issued.

APPENDIX D

FINANCE DOCKET No. 20048[1]

DULUTH, SOUTH SHORE & ATLANTIC RAILROAD COMPANY v. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY ET AL.

Decided September 25, 1959

(1) Found that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act. Order entered requiring termination of such violation.

(2) Motion of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company to dismiss the section 1(18) application in Finance Docket No. 20139 overruled.

(3) Present and future public convenience and necessity found not shown to require operation by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of connecting and interchange tracks near Republic, Mich. Application under section 1(18) denied, and supplemental application under section 5 dismissed.

Henry S. Mitchell and *Thomas M. Beckley* for the complainant.

R. K. Merrill, J. J. Nagle, L. S. Hamilton, F. M. Long, Bernard H. Davidson, and *Philip H. Porter* for certain rail carriers.

[1] This report also embraces Finance Docket No. 20139, Chicago, Milwaukee, St. Paul and Pacific Railroad Company et al. Operations, et cetera.

C. H. Dickman and Edgar Vanneman, Jr., for an intervener.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS FREAS, WALRATH, AND GOFF

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by defendants in Finance Docket No. 20048 and by the interveners in Finance Docket No. 20139. Our conclusions in the latter proceeding differ from those of the examiner.

On January 8, 1958, the Duluth, South Shore & Atlantic Railroad Company, a common carrier by railroad subject to part I of the Interstate Commerce Act, hereinafter referred to as complainant or the Duluth, filed a complaint alleging that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, also common carriers by railroad subject to part I of the act, hereinafter referred to collectively as defendants or applicants, as the case may be, and individually as the Milwaukee and the Ishpeming, have constructed and are operating connecting and interchange tracks hereinafter described, near Republic, Mich.,[2] in violation of the provisions of section 1(18)-(22) of the act. It seeks an order requiring the defendants to cease such violation.

In answers filed February 13, 1958, by the Milwaukee, and February 14, 1958, by the Ishpeming, defendants admitted that they had constructed and were operating the tracks specified in the complaint but contended that such tracks are "switching tracks" within the purview of the exemption provided in section 1(22) and, therefore, that such actions were and are not in violation of the provisions of the act,

[2] Unless otherwise specified, all points mentioned herein are in Michigan.

stating that, if there were any doubt, they would file an application for appropriate authority.

Such application under section 1(18) was filed in the embraced proceeding on March 27, 1958, and on August 1, 1958, it was supplemented by a filing under section 5(2) in which approval was sought of the joint use of certain trackage of each by the other. Subsequently, applicants moved to dismiss their applications which motion was subsequently made applicable on the ground that the tracks involved are "switching tracks" and, therefore, excepted by provisions of section 1(22) from those of section 1(18) and by the provisions of the latter section from those of section 5(2).

The complaint, the application, and the motion for dismissal of the application were assigned for hearing on a consolidated record. A hearing was held and the applications were there amended. Briefs were filed. No representations were made by State authorities. Complainant and the Chicago and North Western Railway Company, hereinafter referred to as the North Western, were permitted to intervene in the application case.

The complaint case.—Near Republic, Ishpeming's line between Duncan and Republic Mine was constructed parallel and adjacent to the line of the Milwaukee extending between Milwaukee, Wis., and Champion via Iron Mountain and Channing. At the time Ishpeming's line was constructed, and subsequently until the tracks involved herein were built, the portion of this line of the Milwaukee located in Michigan connected only at Champion with the Duluth's main line, at Channing with the line of the Escanaba and Lake Superior Railroad Company, and at Iron Mountain with the line of the North Western extending between Escanaba and Ashland, Wis.; and Ispheming's line, so far as here material, connected at Marquette with the Duluth's line, and at Little Lake with the North Western's line ex-

tending between Ishpeming and Escanaba; but there was no connection between the lines of the Ishpeming and the Milwaukee.

The tracks involved herein were constructed in the fall of 1957. They consist of (1) 262 feet of crossover track between the main lines of the Milwaukee and the Ishpeming, of which 148 feet are owned by the former and 114 feet by the latter; (2) a track 1,978 feet in length parallel and adjacent to and turning out of the main line of the Ishpeming, hereinafter referred to as track 1, of which 1,076 feet and both turnouts are owned by the Ishpeming and 902 feet by the Milwaukee; and (3) a track 1,746 feet in length parallel and adjacent to and turning out of the last-described track, hereinafter referred to as track 2, of which 835 feet and one turnout are owned by the Ishpeming and 911 feet and one turnout by the Milwaukee.

Upon the completion of the construction work on these tracks, defendants filed tariffs, establishing through routes and joint rates on various commodities over their lines via this crossover track, which are now in effect.

The freight-train service of the Milwaukee over its line between Channing and Champion consists of one round-trip schedule 5 days per week. Its northbound train No. 69 is scheduled to leave Channing at 9:30 p.m., and Republic at 10:45 p.m., and to arrive at Champion at 11:12 p.m. Its southbound train No. 82 is scheduled to leave Champion at 12:01 a.m., and Republic at 2:40 a.m., and to arrive at Channing at 2:15 a.m.

The Ishpeming also operates freight-train service 5 days per week between Ishpeming and Republic. Its southbound train is scheduled to arrive at the crossover track, hereinafter called Republic Junction, at 10 a.m., and on the northbound trip at noon.

The interchange service at Republic Junction is generally performed in the following manner: The Milwaukee's

northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken, and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line, whichever is more convenient. The train then proceeds to Champion. On the southbound trip, the train is stopped just north of the crossover track switch where the engine is disconnected from the train and moved south of the switch. The switch is thrown, and the engine then moves backwards over the crossover track and on to track 2 where it is connected with cars placed there by the Ishpeming for delivery to the Milwaukee. It then reverses its movement, returns to the train and proceeds to Channing. The Ishpeming's trains are operated in about the same manner except that the crossover track is not used.

The first question for determination is the character of the tracks used in the performance of the operation described above. If they are "switching tracks" within the purview of section 1(22), their construction and operation are not subject to the provisions of sections 1(18) and 5(2), and the complaint and the application here considered should be dismissed. On the other hand, if the tracks are not within the purview of section 1(22), applicants are in violation of the provisions of section 1(18), and the motion to dismiss the application should be overruled.

As heretofore noted, defendants contend that the tracks under consideration are merely switching tracks and, as such, fall within the exemption provisions of section 1(22) of the act. They allege that the tracks are used merely to switch cars from one line to the other; that they are not used for the movement of trains; that no new territory is served by the carriers as a result of the connecting tracks;

and that the establishing of the connection does not constitute an "extension" of the lines of either carrier, as that term is used in section 1(18) of the act. Defendants cite a number of Commission and court decisions which they contend fully support their position.

In *Texas & P. Ry. Co.* v. *Gulf C. & S.F. Ry. Co.*, 270 U.S. 266, the Supreme Court stated as follows:

> A truer guide to the meaning of the terms "extension" and "industrial track" as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. • • • The act sought, among other things, to avert such losses.
>
> When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms "extension" and "industrial track" become clear. The carrier was authorized by Congress to construct, without authority from the Commission, "spur, industrial, team, switching or side tracks • • • to be located wholly within one state." Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or

compelled depends largely upon local conditions, which the state regulating body is peculiarly (sic) fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks * * *

Considered in the light of the facts involved and the above-quoted decision, it is our opinion that the tracks in question are not mere "switching tracks" utilized for loading, reloading, storing, and switching the cars and for other things merely incidental to the regular train haul, but are, in fact, "extensions" of the lines of both defendants bringing them within the provisions of section 1(18) of the act.

While the physical movement of the cars from the line of one carrier to the other is, as contended by defendants, a switching movement, the act of placing or removing the cars on the connecting tracks is not a mere switching operation that is incidental to a regular train movement. Instead, it is an actual part of the through movement by the traffic without which there would be no through movement by the defendant carriers. It is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants. Through the

use of the connecting tracks, defendants have established a through route for the handling of traffic and, as stated by the Supreme Court in *Atlantic Coast Line R. Co.* v. *Riverside Mills*, 219 U.S. 186, 198, "through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system."

Prior to the construction of the connecting tracks there was no connection between defendant lines; there was no way that traffic could be routed from origin to destination over the lines of the defendants; and all traffic destined to points on either of the defendant lines would have moved over routes in which other carriers would have participated. Thus, the creation of the connection enabled both defendants to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers.

The courts and the Commission have uniformly held that connecting tracks to be operated under circumstances such as those here involved constitute "extensions" of rail lines within the meaning of section 1(18)-(21) and that they are not excepted from those provisions by the provisions of section 1(22). (See *Texas & P. Ry. Co.* v. *Gulf C. & S.F. Ry. Co., supra; State of Georgia* v. *United States*, 156 F. Supp. 711; *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540; *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 208 N.W. 809; *El Dorado & W. Ry. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 5 F. (2d) 777; *Charleston & W.C. Ry. Co. Construction*, 166 I.C.C. 707; and *Great Southwest R., Inc., Construction*, 295 I.C.C. 829 (not printed in full), decided June 3, 1958). Under the circumstances here existing the construction of the connecting and interchange tracks here involved constitute an extension of the lines of the defendants, which lawfully could be constructed or operated only upon obtaining an appropriate certificate

from this Commission. An order will be entered in the title proceeding requiring the termination of the violation of section 1(18)-(22) of the act, and the motion to dismiss the section 1(18) application in Finance Docket No. 20139 will be overruled.

The application case—In attempting to establish that the present and future public convenience and necessity require operation over the connecting and interchange tracks, applicants rely in part upon evidence showing traffic moving over the connection since its establishment. Interveners contend that, inasmuch as the traffic was not handled under any color of right, such evidence should be disregarded for that purpose. They assert that the granting of authority to operate the connection, based upon evidence concerning the traffic transported thereover, would have the effect of sanctioning the violation of section 1(18)-(22) and would not be consistent with the public interest.

While we do not condone the failure of applicants to utilize proper caution before proceeding to establish the connection in question, we are of the opinion that the disputed evidence is admissible on, though not controlling of, the issue of public convenience and necessity.

As stated, the crossover and interchange tracks were constructed in the fall of 1957, and operations thereover were instituted on October 21 of that year. The overwhelming preponderance of the traffic moving over the connection during the first 8 months of operations consisted of saw logs and chemical wood. Out of a total of 1,756 cars interchanged between the Milwaukee and the Ishpeming at Republic Junction during the period October 21, 1957, through June 30, 1958, 1,629 originated at points located on the Ishpeming's line and terminated at points on the Milwaukee's line; 50 originated on the Ishpeming's line and terminated at points beyond the Milwaukee's line; 51 originated on the Milwaukee and terminated on the Ishpeming;

and 26 originated at points beyond the Milwaukee and terminated on the Ishpeming. Of the 1,629 shipments mentioned, 545 consisted of saw logs transported under "manufacture and reshipping" rates and 955 consisted of chemical wood. These 2 commodities accounted for 85.4 percent of the total traffic interchanged and 89.3 percent of that delivered by the Ishpeming to the Milwaukee.

Applicants' only evidence relating to the transportation of commodities, other than saw logs and chemical wood, was an exhibit showing the shipments interchanged between the Ishpeming and the Milwaukee at Republic Junction during the same 8-month period. While 21 different commodities or classes thereof, other than saw logs and chemical wood, were handled, only 3 moved in quantities of 10 or more carloads: 102 carloads of charcoal, 22 carloads of sawdust, and 27 carloads of ore. No testimony was presented by any shipper or consignee respecting any need or desire for service over the connection at Republic Junction as to commodities other than saw logs and chemical wood.

A company engaged in the manufacture and sale of lumber, juvenile furniture, and charcoal at Iron Mountain, hereinafter called the Iron Mountain shipper, and a manufacturer of hardwood lumber located at Spur 247, approximately 2 miles out of Amasa on the Milwaukee line, hereinafter called the Amasa shipper, support the application. The Iron Mountain shipper obtains about 90 percent of its supply of saw logs (for the manufacture of lumber) and a small percentage of its supply of chemical logs (for the manufacture of charcoal) from the Cleveland Cliffs Iron Company, hereinafter called Cleveland Cliffs, such logs received by rail are trucked to the railhead at Sunrise Landing, the eastern terminus of the Ishpeming's line, thence by rail to the shipper's plant. Prior to 1958, practically all of its shipments were transported by rail, but since that time approximately 50 percent have moved by truck. Logs form-

erly moved from Seney (on the Duluth) to Champion, thence via the Milwaukee to Iron Mountain, or via the Duluth to Ishpeming, thence the North Western to Antoine Junction north of Iron Mountain, where they were delivered to the Milwaukee for reciprocal switching to the plant. Saw logs move on so-called manufacture and reshipping rates and, in order to receive the transit privilege accruing under such rates, the shipper must route a proportion of its saw logs into Iron Mountain via both of the carriers serving Iron Mountain (the Milwaukee and the North Western) if it is to be enabled to ship finished material outbound over both carriers.

So long as the saw logs moved out of Seney, the shipper had no routing problem since the Duluth had connections with the Milwaukee at Champion and with the North Western at Ishpeming, thus providing alternative routes to Iron Mountain, and traffic could be routed over either of the delivering lines as desired. Since the establishment by the Ishpeming in October 1957, of an extension of its line (about 16 miles, between Cusino and Sunrise Landing) in Schoolcraft and Alger Counties, Mich., authorized in *Lake Superior & I. R. Co. Construction*, 295 I.C.C. 812 (not printed in full), decided November 28, 1956, hereinafter called the *Extension* case, Sunrise Landing, rather than Seney, has been utilized by the Cleveland Cliffs Iron Company as the shipping point for its logs; about 15 miles to the northeast of Seney, it is closer to the logging operation, making it less expensive to truck the logs to the railhead. Since Sunrise Landing is not served by the Duluth, the alternative two-line routing via Duluth-Champion-Milwaukee-Iron Mountain is no longer available. A two-line route from Sunrise Landing via the Ishpeming-Little Lake-North Western-Iron Mountain, is available, but the only routing from points on the extension over the Milwaukee is a three-line movement, with the Duluth a bridge carrier between Marquette and Champion.

Inasmuch as a three-line haul to its plant would involve higher transportation costs and was, therefore, not considered feasible, the Iron Mountain shipper urged the applicants to establish the connection at Republic Junction so that it could have alternative two line routings over either the North Western or the Milwaukee to its plant.

The Iron Mountain shipper obtains its supply of chemical logs from several sources and more than 50 percent thereof is transported by truck. Chemical logs move on relatively low rates, but the costs involved in routing such shipments in more than a two-line haul may be prohibitive. Chemical wood does not move on transit rates, and, therefore, the shipper does not require the alternative routing on that commodity. Nevertheless, it has been the practice of this manufacturer to divide the traffic between the Milwaukee and the North Western for the delivery of its chemical wood since the establishment of the connection at Republic Junction.

The shipper receives approximately 65 carloads of chemical logs and from 15 to 30 carloads of saw logs from Sunrise Landing each week, and controls the routing and pays the freight charges. Although its witness expressed the opinion that the route via the connection at Republic Junction involves less transit time than would be involved if shipments were routed over the North Western, upon cross-examination he was not able satisfactorily to support his position. Transit time is important during the summer months because lumber is subject to stain if manufactured much more than 10 days after the logs are cut and the shipper desires to work the logs as soon after cutting as possible. The shipper is of the opinion that it is able to receive more definite information on the progress of its shipments when routing is via the Milwaukee, and desires the continuance of such service, made possible by the connection at Republic Junction.

The Amasa shipper, located on the Milwaukee, also utilizes the service of applicants for the delivery of shipments of saw logs from Sunrise Landing. The company also moves its shipments under manufacture and reshipping rates, and, prior to the time the Ishpeming extended its line to Sunrise Landing, its shipments originated at Seney. There was a two-line route available from Seney to its plant via Duluth-Champion-Milwaukee. By reason of the new connection at Republic Junction, there is a two-line route available to the plant from Sunrise Landing, but any other route would involve a three-line haul, which, it feels, would involve prohibitive rates. This shipper receives approximately 200 carloads of logs per year from Sunrise Landing but utilizes truck services from other sources to obtain more than one-half of its log supply.

In the event the connection at Republic Junction were closed and it became necessary to utilize a three-line movement involving higher rates, the shipper would turn to truck service for the delivery of its logs. Although delivery delays were experienced from Seney, as well as "bunching" of cars, making it necessary to unload to a dock and to rehandle the logs in order to avoid demurrage, the record does not indicate whether these shortcomings were occasioned by the Duluth or the Milwaukee. The service presently rendered over the connection at Republic Junction is entirely satisfactory to this shipper; it has experienced no "bunching" of cars, and it finds that it is easier to obtain definite information concerning shipments, and that deliveries can be depended upon to arrive on time.

The Ishpeming owns 258 flatcars which are used in transporting saw logs and chemical wood. Of these, 88 have become somewhat worn and are in such condition that they cannot be utilized if placed in large trains. The North Western, which operates longer trains on the lines over which all the saw logs would move were it not for the new connection

has notified the Ishpeming that it no longer can accept in interchange any of the 88 cars mentioned. The Milwaukee, however, operates only light trains through the connection at Republic Junction, and the 88 cars mentioned are entirely adequate for use in such trains. This has resulted in a substantial saving to the Ishpeming since it makes it possible for it to avoid per diem charges on cars owned by other carriers. By being able to use all of its flatcars, and by virtue of a quicker turnaround of cars effected by the Milwaukee than was provided by the North Western, the Ishpeming's fleet of flatcars is adequate to meet the existing need for that type of car.

The North Western and the Duluth vigorously oppose the granting of any authority to applicants for operation of the connection at Republic Junction. They contend that the unauthorized construction and operation of the connection has resulted in a substantial diversion of traffic that had previously moved over their lines; that the continued operation of the connection will have a further adverse effect upon their business by increasing that diversion; that there has been no showing that the public convenience and necessity require operations over the connection; and that applicants have failed to prove that existing carriers cannot adequately, economically, and efficiently handle the traffic now moving over the connection.

With respect to movements of commodities other than saw logs and chemical wood, the competition for traffic resulting from the connection at Republic Junction has not resulted in any substantial diversion of traffic from the North Western and the Duluth to the Milwaukee. During the 9-month period November 1, 1956, through July 31, 1957 (a period prior to the establishment of the connection), the North Western delivered to the Ishpeming at Little Lake 1,383 carloads of commodities other than saw logs and chemical wood, and during the 9-month period November 1,

1957, through July 31, 1958 (a period immediately following the creation of the connection), it delivered 893 carloads of such commodities, or 490 carloads less than during the prior period. During the later period, however, the Milwaukee transferred to the Ishpeming only 62 carloads of such commodities. At most, therefore, the North Western suffered a diversion of only 62 carloads of such traffic. Southbound, the Ishpeming transferred to the North Western 2,349 carloads (other than saw logs and chemical wood) in the 9-month period ended July 31, 1957, and 1,508 carloads in the 9-month period ended July 31, 1958, a difference of 841 carloads. During the latter period, however, there were only 236 carloads (other than saw logs and chemical wood) forwarded by the Ishpeming over the Milwaukee. Thus, on such other commodities, the North Western could not have lost during the first 9 months of operation over the connection more than 62 carloads of the northbound traffic and 236 carloads of the southbound traffic. This amounts to only 7 percent of the 1956-57 volume of traffic (other than saw logs and chemical wood) interchanged by the Ishpeming and the North Western, and less than 12 percent of the total traffic interchanged between the Ishpeming, on the one hand, and the North Western and the Milwaukee, on the other, during the 9-month period of 1958 specified.

While there was no documentary evidence presented showing any specific diversion of traffic from the Duluth as a result of the new routes via Republic Junction, the Duluth did present an exhibit showing that, during the year from November 1, 1956, to October 31, 1957 (a period preceding the opening of the new routes), it handled, through interchange with the Milwaukee at Champion, 795 carload shipments which, it claims, could have been transported over the new routes had they been in existence. Of this traffic, 235 shipments moved to or from Ishpeming,

428 moved to or from Marquette, and the remainder moved to or from Negaunee and points on the line of the Ishpeming not served by the Duluth. Similar data for the period prior to the hearing but during the time the new routes were in existence were not presented for the record. The aforementioned exhibit shows that 76 different commodities or classes thereof were handled during the period indicated, of which there were 19 that moved in quantities of 10 or more carloads: 165 carloads of fuel oil, 134 charcoal, 56 cement, 47 meat, 29 petroleum products, 29 lumber, 22 coal, 19 gasoline, 18 pulpwood, 17 paper, 17 corn flour, 15 veneer cores, 14 sawdust, 14 tractors, 11 scrap iron, 11 wallboard, 11 roofing, 11 rosin, and 10 flooring. During the first 8 months of operation over the connection at Republic Junction, the Ishpeming and the Milwaukee interchanged no shipments of fuel oil, meat, petroleum products, coal, pulpwood, corn flour, veneer cores, wallboard, or rosin, and only 8 shipments of lumber, 7 of cement, 6 of oil and gasoline, 4 each of roofing and flooring, 3 of tractors, and 3 of scrap iron. Of the commodities other than saw logs and chemical wood interchanged by the Ishpeming and Milwaukee during the period mentioned and moving in quantities in excess of 10 carloads, there were 29 carloads of ore, 22 of sawdust, and 14 of paper.

While the foregoing does not permit accurate measurement of the amount of traffic diverted from the Duluth since the new routes via Republic Junction were established, it does establish that comparatively little of the type of traffic, other than saw logs and chemical wood, that was handled by the Duluth prior to the existence of the connection has since been interchanged between the Ishpeming and the Milwaukee. It is also evident that the North Western has continued to handle substantial volumes of traffic consisting of commodities other than saw logs and chemical wood notwithstanding the new connection.

As stated, no testimony was presented by any shipper or consignee as to commodities other than saw logs and chemical wood. Regardless of the amount of such traffic that may have already been diverted as the result of the connection at Republic Junction or the amount that might be diverted in the future, the record shows that the North Western and the Duluth have continued to handle the preponderance of such traffic that has moved over the lines of the Ishpeming since the creation of the connection at Republic Junction, and there is nothing of record to indicate that the service afforded by the North Western and the Duluth in transporting such commodities is in any way inadequate or that there is a need for any additional service. In situations where existing facilities are physically adequate, the addition of more facilities is unwarranted unless it is apparent that some insurmountable obstacle operates to prevent use, in full, of the facilities already in existence. *Atchison, T. & S. F. Ry. Co. Construction*, 261 I.C.C. 227. There is nothing to indicate that the facilities of the North Western and the Duluth cannot be fully utilized for the transportation of commodities other than saw logs and chemical wood or that such carriers are unwilling or unable to provide a reasonably satisfactory service in the transportation of such commodities.

The overwhelming preponderance of the traffic moving over the connection consists of saw logs and chemical wood, and the only public support of the applications is that of the two shippers interested in the transportation of those commodities from Sunrise Landing to their respective places of business. The circumstances leading to applicants' present service to those shippers and over the new connection require special consideration, including our taking official notice of the report in the *Extension* case, in determining the basic question of public convenience and necessity.

As heretofore indicated prior to 1957 there was a sub-

stantial movement of saw logs and chemical wood from Seney to Iron Mountain via the Duluth and the Milwaukee and the Duluth and the North Western, and of saw logs from Seney to Amasa via the Duluth and the Milwaukee.

The Iron Mountain shipper urged the Cleveland Cliffs Iron Company, the supplier of the logs and also the controlling stockholder of the Ishpeming, to find some means of supplying and transporting the logs to Iron Mountain at a reduced overall cost, specifically suggesting the extension of the line of the Ishpeming to a point in the area northeast of Seney closer to the source of the logs. As a result thereof, the Ishpeming filed its application in the *Extension* case, and operations from Sunrise Landing were instituted in October 1957.

The record establishes that, although it urged the Sunrise Landing Extension, the Iron Mountain shipper was aware that if it obtained its saw logs from Sunrise Landing, it no longer would have a two-line route which included the Milwaukee in the absence of a connection between the latter and the Ishpeming, and that without such connection, the only two-line route from Sunrise Landing was via the Ishpeming to Little Lake and the North Western beyond.

Although the report in the *Extension* case states that none of the traffic transported over the extension would be in any "material degree subject to the competition of connecting lines for its routing," thus indicating that most of the traffic would be interchanged with but one carrier, the witness for the Iron Mountain shipper does not believe that the Ishpeming, in applying for the aforementioned extension, contemplated movement of all the saw logs and chemical wood from Sunrise Landing to Iron Mountain via the North Western, he having personally urged, on behalf of his company, the establishment of the connection with the Milwaukee at Republic Junction.

While the record herein does not definitely establish that the proposal for the Sunrise Landing extension and the establishment of the Republic Junction connection were made simultaneously, and that the parties were necessarily aware, at the time the extension application was being considered, that the connection with the Milwaukee would be established and utilized for the interchange of traffic moving over the extension, it is noted that operations over the extension were instituted on approximately the same date that service over the connection at Republic Junction was inaugurated. The record does make it clear, moreover, that the competitive situation changed substantially when operations began over the extension, and that such change resulted from the use of the new connection for traffic moving from the extension.

When its shipments originated at Seney, the Iron Mountain shipper had alternative routings available to it, one via the Duluth to Champion thence to its plant via the Milwaukee. The record establishes that this shipper knew at the time the extension was being considered that there was no physical connection between the lines of the Ishpeming and the Milwaukee, and that the shifting of the origin of its shipments from Seney on the Duluth to Sunrise Landing on the Ishpeming would involve the loss of the two-line routing via the Milwaukee. It is clear, therefore, that either the manufacturer had no interest in a route via the Milwaukee, or it knew at the time the extension was being considered that the connection at Republic Junction was to be established. On the basis of representations made by the applicants that the creation of the connection at Republic Junction was not contemplated at the time the extension to Sunrise Landing was under consideration, we must conclude that the manufacturer, at that time, was primarily interested in originating its saw logs and chemical wood closer to their source, and that the lack of a two-line route

via the Milwaukee from the new origin point was of no material concern to it.

Notwithstanding this earlier apparent lack of interest in the alternative two-line routing via the Milwaukee, the Iron Mountain shipper now bases its support of the instant application upon a need for a two-line routing on shipments of saw logs which will enable it to take advantage of the transit privileges accorded thereunder by utilizing the Milwaukee on outbound shipments of finished lumber.

Prior to the construction of the Sunrise Landing the rates on saw logs from Seney to Iron Mountain were substantially lower than those from Cusino, then the easternmost point on the Ishpeming. After operations were instituted on the extension, however, the rates from Sunrise Landing to Iron Mountain were reduced below those applicable from Seney to Iron Mountain. With this rate reduction, and the reduction in the trucking costs incident to moving the logs to the railhead, the Iron Mountain shipper realized substantial savings in the overall delivered cost of its saw logs. This shipper, of course, still may obtain saw logs from Seney, should it desire to do so, and, from that point, the two-line route via the Duluth to Champion, thence the Milwaukee to Iron Mountain is available. By using such route, the shipper can balance its inbound shipments with outbound shipments via the Milwaukee; it concedes that the service received on shipments from Seney was satisfactory, that, if delivery could be made for the same overall price as now prevails on shipments from Sunrise Landing, it would have no objection to having its shipments originate at Seney, and that, in such circumstances, its claimed need for service via Republic Junction would no longer exist. Use of the Seney railhead, however, involves trucking costs approximately $21 a carload in excess of those to Sunrise Landing. Unless it can obtain the delivery of its logs at a cost no higher than the present delivered cost on shipments

from Sunrise Landing, the shipper represents that it will utilize trucks for the delivery of all of its logs, which are available from suppliers other than Cleveland Cliffs, although it does not indicate what the cost of such delivery would be. As heretofore indicated, the rail rates from Sunrise Landing are now lower than the previous rates from Cusino, although Sunrise Landing is 16 miles farther from Iron Mountain.

The Amasa shipper also supports the application to retain the two-line route via the Ishpeming and the Milwaukee. Although this shipper now claims that it could not afford to utilize the three-line route, which would be the only route available to its plant from points on the Sunrise Landing extension if the connection at Republic Junction were eliminated, the record shows that this shipper knew of the extension application filed by the Ishpeming, and that Cleveland Cliffs would originate shipments of saw logs at points on the extension if that application were granted. The record shows too that this shipper also was aware that, in the absence of a connection at Republic Junction, there would be no two-line service available to it off the extension if that application was approved. Despite such knowledge, this shipper did not participate in the *Extension* case. It appears, therefore, that, at the time the extension application was being considered, either the shipper was not concerned with a need for a two-line route to its plant from points on the extension or it was aware that such a route would be available by the establishment of the connection at Republic Junction; as with the Iron Mountain shipper, we must assume, in the circumstances, the first alternative.

When the origin point for its traffic shifted to Sunrise Landing, the Amasa shipper realized a saving of $3 per thousand log feet, or 2.2 cents per pound in the cost of trucking the shipments to the railhead over the cost that

had been involved in trucking the logs to the railhead at Seney. The shipper believes that the present rate on saw logs from Sunrise Landing to its plant is too high, and at the time of the hearing was negotiating for a rate approximating that prevailing from Sunrise Landing to Iron Mountain. Unless it obtains such a rate, it intends to discontinue rail service and to utilize trucks for the transportation of all its logs.

If the Republic Junction connection were closed, the savings the shipper would realize in trucking costs to the railhead at Sunrise Landing would be more than offset by the added transportation costs involved over the three-line route via the Ishpeming, the Duluth, and the Milwaukee. The two-line service necessary in order that this shipper may take advantage of the manufacture and reshipping rates is, and has been available to it from Seney. In the absence of the new connection, however, it is obvious that the shipper would have to weigh the respective advantages of two-line service from Seney, under which it may use the manufacture and reshipping rates, three-line service from Sunrise Landing, in connection with which it enjoys lower trucking costs, and through movement of its logs by truck.

There is no indication that this shipper has requested Cleveland Cliffs to originate its saw logs at Seney rather than at Sunrise Landing or that it has attempted to obtain its saw logs from any source other than Cleveland Cliffs. There is also nothing to indicate that the shipper, in an attempt to utilize from Seney the two-line service it allegedly requires, has made any attempt to negotiate for a reduction in the trucking costs, the freight rate, or in the other costs involved in obtaining delivery of its saw logs.

It is apparent that the interests of the supporting shippers would be served by utilizing the Republic Junction connection, and that such interests are important in determining the question of public convenience and necessity.

But where, as here, the shippers are already provided with adequate transportation service, the benefits which would inure to them by routing over that connection must be weighed against the detrimental effect, if any, resulting therefrom. *Breckenridge Cham. of Com.* v. *Wichita Falls, R. & F. W. R. Co.*, 109 I.C.C. 81. This includes the probable effect upon competing carriers. As shown in the *Extension* case, the Duluth opposed the granting of authority to the Ishpeming to extend its line to Sunrise Landing, contending that the Ishpeming, as a controlled subsidiary of Cleveland Cliffs would become the originating carrier of the most important shipper from the involved area, and that Cleveland Cliffs might thereby obtain benefits which would result in certain abuses not consistent with the provisions of the act and the public interest. As noted therein, it had been represented that all traffic involved would be outbound and that it would not in any material degree be subject to the competition of connecting lines for its routing. Accordingly, it was found that the record therein did not justify a conclusion that the abuses anticipated by the Duluth would occur.

As heretofore indicated, however, the competitive situation changed substantially when operations over the extension were inaugurated, use of the unauthorized connection providing the Iron Mountain shipper with an alternative two-line route via the applicants' lines and the Amasa shipper with a single two-line route, again over applicants' lines, and both such routes made possible by the connection have been used extensively. Although applicants contend that very little of the traffic moving thereover has been diverted from interveners and assert that, by reason of the low rates under which such commodities move, those carriers would be better off without that traffic, the record shows that use of the unauthorized connection has resulted in traffic being diverted from interveners to applicants;

moreover, even though the commodities involved are low rated, the traffic is nevertheless important to the North Western and the Duluth. These carriers have afforded a transportation service for such commodities over a long period of time, and there is merit to their assertion that in order for any carrier to handle such traffic profitably, it must be handled in large quantities. The North Western contends that the division of the traffic resulting from the establishing of the unauthorized connection will so reduce the volume to be handled by the individual carriers, and thus, so increase their unit costs, that it will be impossible for any of them to realize profit therefrom, possibly resulting in a curtailment of service, especially since the traffic involved moves on scheduled trains.

Since the record shows that a large number of shipments of saw logs and chemical wood have moved over the Republic Junction connection since its establishment in October 1957, whereas all that traffic formerly moved over the lines of other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.

Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic

is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connection making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection. In the circumstances, the section 1(18) application should be denied, and the supplemental application under section 5 dismissed.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and have been found to be without material significance or not justified.

Findings

We find: 1. That the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company have constructed and are operating near Republic, Mich., extensions of their respective lines of railroad in violation of the provisions of section 1(18)-(22) of the Interstate Commerce Act; and that, accordingly, the motion filed by such carriers to dismiss the section 1(18) application in Finance Docket No. 20139 should be overruled.

2. That the present and future public convenience and necessity are not shown to require operation by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company of the con-

necting and interchange tracks near Republic, Mich., and, therefore, that the section 1(18) application in Finance Docket No. 20139 should be denied, and the supplemental section 5 application therein dismissed.

An order will be entered requiring the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and the Lake Superior & Ishpeming Railroad Company, within 45 days from the effective date thereof, to cease and desist, and thereafter to abstain, in the absence of appropriate authority therefor, from maintaining and operating the connecting and interchange tracks near Republic, Mich., overruling the motion to dismiss the section 1(18) application in Finance Docket No. 20139, denying said application, and dismissing the supplemental section 5 application.

COMMISSIONER FREAS concurs in the result.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

MOTION TO AFFIRM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY.

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

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MOTION TO AFFIRM.

Appellees in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move this Court to affirm the final judgment and decree of the District Court on the ground the question on this appeal is so unsubstantial as not to warrant consideration by this Court.

QUESTION PRESENTED.

The question presented by appellant's Jurisdictional Statement can be stated simply:

Does the ultimate judicial power to decide that the Republic Junction connection was not an "extension" of a line of railroad within the meaning of section 1(18) of the Interstate Commerce Act reside in the District Court or in the Interstate Commerce Commission?

STATEMENT.

This is a direct appeal from the decision of the District Court that the connection between the tracks of the Milwaukee and Ishpeming at Republic Junction, Michigan, was within the exception of section 1(22) of the Interstate Commerce Act and, therefore, not an "extension" of their respective lines of railroad within section 1(18). Defendants below were the United States of America and the Interstate Commerce Commission. Appellant and the Duluth South Shore and Atlantic Railroad Company, now the Soo Line Railroad Company, intervened as defendants. The Department of Justice, the Soo Line, and the Interstate Commerce Commission, by electing not to join in this appeal, have accepted the decision of the District Court.

This litigation commenced before the Interstate Commerce Commission with the filing of a complaint by the South Shore alleging the connection was an "extension" of appellees' respective lines of railroad within section 1(18) of the Act and requesting the Commission to investigate and require appellees to comply with sections 1(18) through 1(21). Appellees' reply averred the connecting track was not a section 1(18) extension, but was excepted therefrom by section 1(22).

No defendant or intervening defendant below applied to a district court for an injunction under section 1(20) of the Act, a procedure by which the status of the track might readily have been determined. Appellant chose to litigate only before the Interstate Commerce Commission and itself failed to pursue the only available procedure by which it could have sought the closing of the connection prior to the Commission's final order.

In response to the complaint before it the Commission suggested by letter that the connection might be an "extension" within section 1(18) and that appellees should file a section 1(18) application for a public convenience and necessity certificate permitting the new construction. In compliance with the Commission's suggestion, appellees made such an application[1] accompanied by a motion to dismiss same on the ground the Commission had no jurisdiction over the connection in that it was not an "extension" under section 1(18). Appellant and the South Shore Railroad intervened in opposition to the application.

Upon entry of the Commission's final order in April 1960, appellees brought this suit seeking to annul, set aside and enjoin the enforcement of the Commission's orders. On appellees' motion after notice and hearing, the District Court, to preserve the status quo which had existed since the connection was built, issued a preliminary injunction on June 13, 1960, against any attempt to enforce the Commission's orders pending final disposition of the cause. Pursuant thereto the connection remained open, and operations thereover continued.

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[1] Filing such an application is not an admission that the new tracks are an "extension" requiring a section 1(18) certificate. *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, at 273, 46 S. C. 263, 70 L. ed. 578, at 588 (1926).

ARGUMENT.

I.

The Limited Scope of This Appeal.

Three distinct and separate issues were before the lower court:

1. Whether the Interstate Commerce Commission had power to enter a cease and desist order prohibiting operation of the connection.

2. Whether the Republic Junction connection was an "extension" within section 1(18) of the Interstate Commerce Act or whether section 1(22) excepted it from the requirements thereof.

3. Whether the Commission's finding that public convenience and necessity did not warrant issuance of a certificate under section 1(18) was arbitrary, capricious, an abuse of discretion and not grounded on the evidence of record.

Only the second of such issues was decided by the District Court. The issue relating to the Commission's cease and desist order became moot because the Commission meanwhile had rescinded it. The third issue, as the Court correctly held, would have required adjudication only in the event the connection were found to be an "extension" and thus within the jurisdiction of the Commission. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 214 F.Supp. 244, at 247, 250 (D.C.E.D. Wis., 1963).

Appellant does not allege in its Jurisdictional Statement that the District Court erred in holding that the connecting track is within the purview of section 1(22)

and does not argue that it is an "extension" within section 1(18) of the Interstate Commerce Act. Since this issue is not raised in the Jurisdictional Statement, it is not before this Court on this appeal. Supreme Court Rule 15, par. 1(c)(i); *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376, at 386, 80 S.Ct. 474, 4 L.ed. 2d 384 (1960).

The Jurisdictional Statement asserts only that the District Court erred in presuming to determine the status of the connection under sections 1(18)-1(22) of the Act. Appellant suggests the District Court's decision was an unwarranted intrusion into the province of the Commission and that the Commission itself should be the final arbiter of what powers were granted it by Congress.

Were appellant's issue of great public importance, the Interstate Commerce Commission or the United States certainly would have brought the question to this Court. Neither of them appealed from the decision of the District Court; nor did the Soo Line. This lack of support from appellant's co-defendants below indicates not only the validity of the lower Court's decision but also the absence of any substantial question of general public importance.

II.

The Lower Court Acted Within Its Power.

By stating, at page 247 of 214 F.Supp.,[2] that the "final determination" whether a track is an extension is for the court, the lower Court observed that the question before it was one of statutory construction not committed by Congress to the Commission for ultimate adjudication. This issue contrasts markedly with one concerning rea-

[2] Jurisdictional Statement, Appendix A, page 19.

sonableness of a rate or whether public convenience and necessity require a grant of authority. Such questions require the exercise of the Commission's administrative expertise and are exclusively within the Commission's power to decide. *Ches. & Ohio Ry.* v. *United States,* 283 U.S. 35, 51 S.Ct. 337, 75 L.ed. 824 (1931); *Gray* v. *Powell,* 314 U.S. 402, 62 S.Ct. 326, 86 L.ed. 301 (1941); *King* v. *United States,* 344 U.S. 254, 73 S.Ct. 259, 97 L.ed. 301 (1952).

Appellant wrongly equates construing a Federal statute with defining public interest and argues that both should be decided by the Commission and reviewed by the courts only for an abuse of administrative discretion. Such is not the law.

If a track is within the exception of section 1(22), the Interstate Commerce Commission is devoid of jurisdiction to determine any matter relating thereto. Only if a track is an "extension" under section 1(18), and not excepted by section 1(22), is the Commission empowered by Congress to regulate its construction. In *Alabama Ry.* v. *Jackson Ry.,* 271 U.S. 244, at 249, 46 S.Ct. 535, 70 L.ed. 928 (1926), this Court stated:

> "The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of § 1, which excludes from its jurisdiction 'spur, industrial, team switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.'"

The Interstate Commerce Act expressly withholds power from the Commission to make any adjudication regarding a section 1(22) track.

The District Court decided only that the Republic Junction connection was excluded from the Commission's section 1(18) jurisdiction by the operation of section 1(22). The Court did not set aside the Commission's order for error or irregularity on a matter within the jurisdiction of the Commission; rather, it denied the initial jurisdiction of the Commission under section 1(18).

This is a matter of statutory construction, to adjudicate which a Federal court, not the Commission, is vested with jurisdiction. The decision in *United States* v. *Idaho*, 298 U.S. 105, at 109-110, 56 S.Ct. 690, 80 L.ed. 1070 (1936), stated:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the Federal or a state Commission.
>
> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. . . . Here, the jurisdiction of that Commission was challenged."

In *Powell* v. *United States*, 300 U.S. 276, at 287, 57 S.Ct. 470, 81 L.ed. 643 (1937), this Court stated:

> "Unless the project is one covered by § 1(18), the commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application.
>
> "Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the

> question whether the project is one covered by §1(18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under §1(20) to enjoin a violation of §1(18). The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest."

The lower Court did not purport to decide a factual question[3] or to overrule a discretionary act of the Commission. It merely construed sections 1(18)-1(22) with regard to the Republic Junction connection.

In *Piedmont & Nor. Ry.* v. *United States,* 280 U.S. 469, at 476, 50 S.Ct. 192, 74 L.ed. 551 (1930), this Court held:

> "But neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as *res judicata* of the Railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the Railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted. Nothing done by the Commission can prejudice the Railway's claim to immunity in any other proceeding."

And at page 477 of 280 U.S., the decision observes:

> "The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute."

Rochester Tel. Corp. v. *U. S.,* 307 U.S. 125, at 132-134, 59 S.Ct. 754, 83 L.ed. 1147 (1939), is of similar import.

The Commission itself recognized the jurisdiction of the courts to make the ultimate determination of such

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[3] There has never been in this case any dispute as to the extent, character or operation of the connecting trackage.

a question in *Leelanau Transit Co. Abandonment, Northport Branch*, 307 I.C.C. 95, at 102 (1959), where it stated:

> "The Supreme Court of the United States has held that whether trackage is a 'spur' is a mixed question of law and fact left by Congress to the decision of a competent court, not to final determination of either the Federal or a State commission."

That the issue of exclusion under section 1(22) is a judicial rather than an administrative question is attested by cases arising under section 1(20) of the Act. That provision permits an interested party to apply initially to a Federal district court for an injunction prohibiting construction or abandonment not complying with section 1(18). If the track involved is not an "extension", it is excluded from section 1(18) requirements, and the complaint must be dismissed.

The issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein: Is the track a section 1(18) "extension", or is it excluded from the Commission's jurisdiction by section 1(22). Prior Commission determination is not a prerequisite to such a proceeding. *Texas & Pac. Ry. Co.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, at 273-274, 46 S.Ct. 263, 70 L.ed. 578. (1926); *Chicago, M.,St.P. & P.R.Co.* v. *Chicago & E.I. R.Co.*, 198 F.2d 8 (U.S.C.A. 7, 1952); *Southern Pac. Co.* v. *Western Pacific California R.Co.*, 61 F.2d 732 (C.C.A. 9, 1932); *Chicago, Milwaukee, St.P. & P.R.Co.* v. *Northern Pac. R.Co.*, 120 F.Supp. 710, at 712 (D.C.W.D. Wash., 1954).

Congress left the power to decide such an issue in the Federal courts; it was not delegated to the Commission. As this Court held in *Singer & Sons* v. *Union Pacific R.Co.*, 311 U.S. 295, at 313-314, 61 S.Ct. 254, 85 L.ed. 198 (1940), the issue here:

". . . is by paragraphs (18) and (22) of §1 made a judicial, not an administrative question . . . .

"The court is thus called upon to decide no administrative issue which must be submitted to the Commission in advance of suit, and any decree which it may render involves no embarrassment to the Commission or otherwise in the administration of the act."

The *Texas* decision stated at page 273 of 270 U.S.:

"But a party in interest who is opposed to the construction is not authorized by the Act to initiate before the Commission any proceeding concerning the project. If application for a certificate has been made, he may appear there in opposition. If no such application has been made, paragraph 20 affords him the only remedy. That remedy is both affirmative and complete."

The decision in *Powell* v. *United States,* 300 U.S. 276, at 287-288, 57 S. Ct. 470, 81 L.ed. 643 (1937), held:

"The Central was not authorized by the Act to initiate a proceeding before the commission to determine whether the Seaboard's use of the leased tracks was or would be in the public interest. If application for a certificate had been made, the Central could have appeared in opposition. The Seaboard not having made application, the Central's sole remedy was a suit under § 1(20). That paragraph provides the only method for enforcing § 1(18) . . . . The remedy provided by § 1(20) is clearly inconsistent with a proceeding before the commission to attain the same end."

Similar language appears in *St. Louis S. W. Ry.* v. *Mo. Pac. R. Co.*, 289 U.S. 76, at 81-82, 53 S.Ct. 516, 77 L.ed. 1042 (1933).

Appellant thus fails to recognize the distinction laid down by this Court in *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, at 94, 63 S.Ct. 454, 87 L.ed. 626 (1943):

> ". . . If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency — of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."

Such considerations dictate the necessity for the Commission to make an initial determination of its jurisdiction. The Commission must make an express jurisdictional finding not, as appellant contends, because the Commission's mandate to do so is exclusive but in order that state and local interests may be assured of the proper safeguards provided by Congress and that reviewing courts may have the benefit of the Commission's expert judgment. *Yonkers* v. *United States*, 320 U.S. 685, at 692, 64 S.Ct. 327, 88 L.ed. 400 (1944); see also *North Carolina* v. *United States*, 325 U.S. 507, at 511, 65 S.Ct. 1260, 89 L.ed. 1760 (1945), *United States* v. *Capital Transit Co.*, 325 U.S. 357, at 361-362, 65 S.Ct. 1176, 89 L.ed. 1663 (1945), *Connecticut Co.* v. *Power Comm'er*, 324 U.S. 515, at 532, 65 S.Ct. 749, 89 L.ed. 1150 (1945), *Florida* v. *United States*, 282 U.S. 194, at 211-212, 51 S.Ct. 119, 75 L.ed. 291 (1931).

III.

The Idaho and Powell Cases Should Not Be Overruled.

Appellant contends, at pages 5-6 of its Jurisdictional Statement, that *Yonkers* v *United States*, 320 U.S. 685, 64 S.Ct. 327, 88 L.ed. 400 (1944), repudiates *United States* v. *Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.ed. 1070 (1936), and *Powell* v. *United States*, 300 U.S. 276, 57 S.Ct. 470, 81 L.ed. 643 (1937). The doctrine of those decisions is that the question decided by the lower Court herein is judicial, not administrative, and must be determined by a court rather than the Commission. Appellant then argues that the *Idaho* and *Powell* cases should be overruled, and it appears they must be if appellant is to prevail on this appeal.

The theory advanced in the Jurisdictional Statement is that, because *Yonkers* departed from the rule of *Idaho* and *Powell*, a question of the Commission's jurisdiction under sections 1(18)-1(22) is an administrative matter to be determined exclusively by the Commission. The theory has no merit.

Yonkers is not inconsistent with *Idaho* or *Powell*. Rather, it followed those two cases and reaffirmed that Congress did not leave the question exclusively to administrative determination but gave the courts the final say so. The issue in *Yonkers* was whether a section 1(18) order of the Commission was valid in the absence of a finding that the Commission had jurisdiction. This Court held only that the Commission itself should initially make a jurisdictional finding in order to give "added assurance that

the local interests for which Congress expressed its solicitude will be safeguarded" and to provide "the reviewing Courts the assistance of an expert judgment on a knotty phase of a technical subject." In other words, the courts will not approve a section 1(18) certificate issued without benefit of the Commission's judgment that such is legally required by section 1(18).

The *Yonkers* decision falls far short of holding that such a jurisdictional finding is an administrative determination exclusively for the Commission and one which the courts can strike down only if it is arbitrary, capricious or contrary to substantial evidence. In this litigation the decision of the District Court does not imply that the Commission's jurisdictional finding was not accorded all due weight and regard. Its entire opinion is devoted to that question, and there can be no doubt that the Commission's findings were seriously and painstakingly considered by the Court.

IV.

Appellant's Authorities Are Not In Point.

Appellant cites cases purporting to teach that the Interstate Commerce Commission, not the District Court, possessed the final responsibility to construe section 1(22) of the Interstate Commerce Act in the light of the facts regarding the Republic Junction connection. None of those cases, however, hold that the Commission may ultimately decide a question reserved by Congress to the courts. In each of them the Commission decided a matter expressly committed to its administrative judgment, and in none did the Commission decide a question of statutory construction.

United States v. *Pierce Auto Lines,* 327 U.S. 515, 66 S.Ct. 687, 90 L.ed. 821 (1946), concerned the applications of two motor carriers under Part II of the Interstate Commerce Act to extend their respective operations. The issue before the Commission was whether public convenience and necessity required the extensions. Such a question is completely factual, involves no interpretation of a statute, and is clearly a matter within the administrative competence of the Commission to decide. It was not by statute withheld from the Commission as is the issue of exclusion pursuant to section 1(22). The Commission's power to decide the question was not challenged at any stage of the litigation.

United States v. *Drum,* 368 U.S. 370, 82 S.Ct. 408, 7 L.ed. 2d 360 (1962), arose out of a Commission investigation pursuant to Part II of the Interstate Commerce Act, section 204(c), 49 Stat. 547, 49 U.S.C. 304(c), to determine whether certain carriers were contract carriers subject to section 209(a)(1) of the Act, 49 Stat. 552, 49 U.S.C. 309(a)(1). Section 204(c) specifically authorizes the Commission to make such an investigation and to decide whether a motor carrier has failed to comply with any provision of Part II. The resolution of such a question depends, not upon the application of a statute as does the issue under 1(18)-1(22), but upon facts which the administrative tribunal, not a court, has the necessary expertise to interpret. The Commission thus decided only a matter clearly within the scope of its mandate.

The question in *Shields* v. *Utah Idaho R. Co.,* 305 U.S. 177, 59 S.Ct. 160, 83 L. ed. 111 (1938), was whether the railroad company was exempt from the Railway Labor Act

because it was an interurban electric railway. Section 151 of that Act, 48 Stat. 1185, 45 U.S.C. 151, exempts such carriers from its provisions and explicitly commits to the Interstate Commerce Commission the duty to determine whether they are interurban electric railways. On that ground this Court, at page 185 of 305 U.S., distinguished the case then at bar from the section 1(18)-1(22) issue of the *Idaho* case:

> ". . . unlike the case presented in *United States* v. *Idaho*, 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question . . ., the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority."

In *State of Illinois* v. *United States*, 213 F. Supp. 83 (D.C.N.D. Ill., 1962), the Chicago, North Shore & Milwaukee Railway had applied to the Commission for a certificate permitting it to abandon its operations, and the Commission had granted the certificate sought. The State of Illinois alleged in the District Court that the railway was within the exception of section 1(22) of the Act because prior decisions of this Court held that the Railway fell within the exemption of section 20a of the Act, that it was an interurban electric railway within section 151 of the Railway Labor Act, and that it was such under section 77 of the Bankruptcy Act. The Court upheld the Commission's jurisdiction under section 1(18), stating at 213 F.Supp. 87-88:

> "It is apparent from the decisions following the Supreme Court North Shore case that exemptions sim-

> ilar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on; the purpose of the Act, the underlying issues, and the particular facts of the case."

The exception of section 1(22) is not to be read in *pari materia* with other acts providing for similar exceptions. Thus for valid authority appellant must rely only on decisions arising under sections 1(18)-1(22) of the Interstate Commerce Act.

United States v. *Jones*, 336 U.S. 641, 69 S.Ct. 787, 93 L.ed. 938 (1949), is a rate-making case, a subject manifestly within the power of the Commission. This Court observed, at 336 U.S. 651, 652, that the Railway Mail Pay Act, 39 Stat. 412, 39 U.S.C. 523-568, confers upon the Commission exclusive jurisdiction to fix reasonable rates for rail carriage of mail and that such a determination is essentially legislative, not judicial. The question on appeal did not concern the construction of a statute but only whether the Commission acted arbitrarily or unreasonably.

CONCLUSION.

Appellant's Jurisdictional Statement does not present the issue whether the Republic Junction connection is or is not a section 1(18) "extension" requiring a certificate of public convenience and necessity from the Interstate Commerce Commission. The lower Court decided that question in the negative, and appellant does not dispute the correctness of that determination. At issue on this appeal is whether the lower Court committed reversible error by exceeding its powers and encroaching upon the lawful prerogative of the Commission.

Appellant argues that *United States* v. *Idaho*, 298 U.S. 105, 56 S.Ct. 690, 80 L.ed. 1070 (1936), and *Powell* v. *United States*, 300 U.S. 276, 57 S.Ct. 470, 81 L.ed. 643 (1937), now should be overruled and "the law for once and all made clear." Those cases hold that the construction and application of sections 1(18)-1(22) of the Act is a judicial question for the courts rather than an administrative question for the Commission. Appellant disagrees and says these decisions were "gutted" and discarded by this Court in later cases, notably *Yonkers* v. *United States*, 320 U.S. 685, 64 S.Ct. 327, 88 L.ed. 400 (1944).

These decisions do not contradict each other, however, and there is no "more recent, line of cases" suggesting they are not still the law. The compatibility of this Court's decisions of section 1(18)-1(22) questions and the complete irrelevance of appellant's authorities makes it manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argu-

ment. Because no error of the lower Court has been shown and no substantial public question is involved, the judgment of the District Court should be affirmed.

Respectfully submitted,

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January, 1964

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois the ..... day of January, 1964.

.....

RAYMOND K. MERRILL

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

The United States and Interstate Commerce Commission believe that the decision below is erroneous. The government did not appeal because, in its view, the decision was not sufficiently important to warrant seeking review in this Court. This was so, we concluded, because the amount of traffic which is subjected to the possibility of diversion as a result of the

decision below is relatively insignificant in volume. Another party having appealed, however, we deem it appropriate to advise the Court of our view of the merits.

In October 1957, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee") and the Lake Superior and Ishpeming Railroad Company ("Ishpeming") constructed, near Republic, Michigan, a 262-foot track connecting their main lines at a point where they run parallel to each other; they also constructed two interchange tracks parallel to and connecting with the Ishpeming main line, which are used in the transfer of cars from one main line to the other. The total cost of construction was $28,690, which was shared equally by the two railroads. Upon completion of this construction, the Milwaukee and Ishpeming filed tariffs establishing through routes and joint rates on various commodities over their lines via these tracks. The principal use of this junction has been to provide through routing for carriage of saw logs and chemical wood from Sunrise Landing, Michigan, served only by Ishpeming, to Amasa and Iron Mountain, Michigan, which are served by the Milwaukee and other railroads. Prior to this connection, these shipments could move from Sunrise Landing to Amasa or Iron Mountain only on the through route provided by the Ishpeming and the Chicago and North Western Railway ("North Western"). From a different loading point, about 15 miles from Sunrise Landing, the goods could move via the Duluth, South Shore and Atlantic Railroad Co. ("Duluth") and the

Milwaukee. Before the crossover was laid, there was no through route service via the Ishpeming and the Milwaukee available to these towns.

On January 3, 1958, the Duluth filed a complaint with the Interstate Commerce Commission, alleging that the Milwaukee and Ishpeming, by constructing the connecting trackage without obtaining a certificate of public convenience and necessity, had violated Section 1(18), 49 U.S.C. 1(18) of the Interstate Commerce Act.[1] The Commission (Division 4) found that the trackage "is the sole means by which traffic that would otherwise move over other routes via other carriers may be obtained by defendants" (J.S. 48) and ruled that the tracks were "not mere 'switching tracks' utilized for loading, reloading, storing, and switching the cars and for other things merely incidental to the regular train haul, but are, in fact, 'extensions' of the lines of both defendants bringing them within the provisions of section 1(18) of the

---

[1] Title 49 U.S.C.

§ 1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *.

act" (J.S. 48).[2]

On appeal, a three-judge district court reversed, ruling that the Commission had no jurisdiction over the cross-over track because it was not an "extension of lines" but a "switching track", and hence exempt from the regulatory powers of the Commission under Section 1(22) 49 U.S.C. 1(22).[3] The court reasoned

[2] Ishpeming and Milwaukee, in order to protect themselves if they lost on the jurisdictional issue, filed an application for a certificate of public convenience and necessity under Section 5(2) for construction and joint use of the connecting tracks. The Duluth and Northwestern intervened in opposition to the application. The Commission considered this application and the complaint in a consolidated proceeding. In its decision, the Commission also refused to issue the certificate because of the adequacy of existing service and other factors (J.S. 65-66). The district court did not reach the issue of the correctness of this ruling.

On the basis of its decision, the Commission entered a cease-and-desist order prohibiting further use of the cross-over. Subsequently, the Commission withdrew this order, having concluded that the only appropriate remedy was a court injunction under Section 1(20). This action did not moot the instant case, since the Commission's decision that the crossover was within its jurisdiction, and required authorization as an "extention", was an essential element of its adverse ruling on the application by the Ishpeming and the Milwaukee for a certificate of public convenience and necessity.

[3] Section 1(22) provides:

> *Construction, etc., of spurs, switches, etc., within State.* The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways which are not operated as a part or parts of a general steam railroad system of transportation.

that the trackage was not an "invasion" into new territory within the doctrine of *Texas & Pacific Ry. Co.* v. *Gulf, Colorado and S.F. Ry Co.*, 270 U.S. 266, because it was of relatively insignificant length and did not extend into territory served by other railroads, even though through routing was made possible. The court also suggested that the trackage was not an extension because the carriers did not offer any of the services or facilities usually offered on a line, such as express, passenger or mail service, and loading platforms.

We believe the court below adopted an unduly narrow view of what constitutes "an extension of line of railroads requiring certification." In *Texas & Pacific Ry Co., supra*, this Court stated that "where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U.S. at 278).

The primary purpose of the trackage here involved is to connect the lines of two previously unconnected railroads and to enable them to pass cars from one line to the other as part of an "actual transportation haul from the shipper to the consignee"; the arrangement is not "for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul" (*Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540, 547 (E.D. Mich.)). The competitive impact of a new connection cannot be determined from its length. Although substantial amounts of traffic are not at stake here, the result of this short connecting track is to make available to the Ispheming and Milwaukee shipments which formerly had been transported by other railroads.[4] As the Commission found, "the creation of the connection enabled both defendants to compete for traffic in territories not previously served by them and which were theretofore adequately served by other carriers" (J.S. 49). In our view, an invasion of territory within the meaning of *Texas & Pacific* is established when a carrier constructs new trackage which enables it to divert traffic from other carriers previously authorized to transport it. *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga).

[4] The disputed trackage enables the Milwaukee, for the first time, to compete for traffic originating at Sunrise Landing. The new through-route via the Milwaukee gives the Ishpeming a langer haul than on its prior through-route via the Northwestern, thereby increasing its revenues.

If the new line has this effect (as seems plain), it is not exempt from the Commission's jurisdiction merely because it is not constructed in the same area where the adversely affected carriers have their tracks.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District Of Wisconsin

MOTION TO STRIKE MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 710

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

MOTION TO STRIKE MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

Appellees in the above entitled case, pursuant to Rule 35 of the Revised Rules of the Supreme Court of the United States, move this Court to strike from its files the Memorandum for the United States and the Interstate Commerce Commission heretofore filed herein because neither the United States nor the Interstate Commerce Commission are proper parties before this Court

on this appeal and because the filing of such memorandum violates the Federal Rules of Civil Procedure and the Revised Rules of the Supreme Court of the United States. As grounds for this motion appellees show to this Court as follows:

1. The participation of the United States and the Interstate Commerce Commission in this appeal before this Court is contrary to Rules 72 and 74 of the Federal Rules of Civil Procedure and to Rules 10, 11, 13 and 15 of the rules of this Court in that neither the United States nor the Interstate Commerce Commission have filed a Notice of Appeal in the United States District Court for the Eastern District of Wisconsin or a Jurisdictional Statement in this Court. Therefore, neither has properly invoked the appellate jurisdiction of this Court, and neither is a proper party to this appeal entitled to file any document relating thereto or otherwise to appear before this Court herein.

2. Neither the United States nor the Interstate Commerce Commission considered the decision of the lower court herein "sufficiently important to warrant seeking review in this Court,"[1] and, having elected not to appeal from the decision of the lower court, neither should be permitted now to participate in this proceeding.

3. Such memorandum was filed in this Court subsequent to the filing of appellees' Motion To Affirm, and appellees therefore have no opportunity under the rules of this Court to answer the allegations and arguments contained in such memorandum.

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[1] Memorandum for the United States and the Interstate Commerce Commission, page 1.

4. Such memorandum propounds a question which is not before this Court because not raised by appellant's Jurisdictional Statement. Such memorandum therefore attempts to broaden the issues before this Court in violation of the law of this case which requires that the participation herein by the United States and the Interstate Commerce Commission, if any, be limited to the question upon appeal as it exists at the commencement of such participation, namely, at the time such memorandum was filed.

5. The United States and the Interstate Commerce Commission failed to serve a copy of such memorandum on counsel of record in violation of Rule 33 of the Revised Rules of the Supreme Court of the United States in that such memorandum was not served upon Mr. Philip H. Porter, 708 First National Bank Building, Madison 3, Wisconsin, or upon Mr. Richard R. Robinson, 225 East Mason Street, Milwaukee 2, Wisconsin, both of whom are counsel for one or both appellees herein and both of whom appeared in the lower court on behalf of one or both plaintiffs.

6. Contrary to Rule 15(1)(e) of the rules of this Court, the United States and the Interstate Commerce Commission have not attempted to show that the additional question presented in their memorandum is substantial. Appellees believe such question is not substantial, and appellant evidently concurs because such question was omitted from its Jurisdictional Statement. Such memorandum, therefore, has no bearing upon any issue which warrants consideration by this Court. It should be stricken because completely irrelevant, immaterial and extraneous to the question properly before this Court on this appeal.

7. Procedural due process of law requires at least a semblance of adherence to rules designed to insure: that a litigant is fully apprised of the opponent's case, that sufficient opportunity to contest it is afforded, that jurisdiction of the court over the subject matter and the parties is manifest, that the parties are certain of the identity of their opponents, and that an interminable interjection of new matter or intervention of additional parties is avoided. The filing of the Government's memorandum in this appeal is contrary to such elemental concepts of "fair play" among litigants and violates the requirements of procedural due process.

8. To permit the United States or the Interstate Commerce Commission to participate in this appeal without complying with the Federal Rules of Civil Procedure or with the rules of this Court as aforesaid would accord them a privilege, denied other litigants, to come before this Court without complying with the procedural and substantive rules which govern the conduct of litigation herein. To permit them to do so in this instance would abrogate such rules and establish a precedent permitting recourse to this Court without regard to orderly procedure and the requirements of procedural due process of law.

Wherefore, the Memorandum For the United States and the Interstate Commerce Commission should be stricken from the files of this case, and the United States and the Interstate Commerce Commission should be

denied the opportunity to appear before this Court on this appeal.

Respectfully submitted,

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February, 1964

CERTIFICATE OF SERVICE.

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

In addition I have this day served the foregoing document upon each of the following persons by mailing a copy thereof properly addressed with postage prepaid by first-class mail to:

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Dated at Chicago, Illinois the ..... day of February, 1964.

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Raymond K. Merrill

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NO. [redacted] 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY TO MOTION TO AFFIRM

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No. 710

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY TO MOTION TO AFFIRM

Two points in the Motion to Affirm require this brief reply.

1. At pages 6-7 of the Motion, appellees purport to derive from *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244, the proposition that the Interstate Commerce Act precludes I.C.C. from adjudicating the status of track, whether "switch track" or "extension." The *Alabama* case, of course, decided no such question, but instead illustrates the error below, for neither appellees nor the Court below dispute the Commission's findings (J.St.[1] 45) that the tracks involved here connect the *main line* of these two Class I railroads, and that they have never before been interconnected at any point (*ibid*). These facts alone

1. We so identify our Jurisdictional Statement herein.

establish the error of the decision below, for this Court held squarely in *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244 at 250, that:

> the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction.

2. Finally, the Motion to Affirm (pp. 9-10) obliterates the distinction long established by this Court between cases where the District Courts are called upon to compel carriers to obtain I.C.C. authority to construct new track[2] with cases such as this, involving judicial review of I.C.C. orders permitting or forbidding construction of new rail.[3] The issue thus persists—does a Federal District Court, in reviewing a Commission order, retain the same full measure of independent discretion to strike its own balance among these factors as it would have possessed in an original judicial proceeding?

Since the fundamental issue facing the Commission in such cases is economic in character, it involves more than an inventory of physical factors. Will the territory support the new operation, or will the particular construction, regardless of its size or cost, result in wasted resources and impair earnings of the national railway system as a whole, with injuries resulting to other carriers and, ultimately, to the public?

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2. E.g., *Texas & Pacific Ry. Co.* v. *Gulf, C. & SF. Ry. Co.*, 270 U.S. 266.

3. *State of Illinois* v. *United States*, 213 F.Supp. 83 (N.D. Ill. 1962), affirmed 373 U.S. 378; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D.Ga. 1957), affirmed 356 U.S. 273; *Public Service Comm'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed 323 U.S. 675.

While the District Court dealt with the inventory—with the length of the line, population of the territory near the interconnection, schedules, station buildings and telegraph lines (J.St. 23-24), these issues are far from dispositive of the Commission's economic judgments. Reaching beyond these basic facts, I.C.C. found (J.St. 65-66) that this area was one of "light traffic density (J.St. 65)," producing only "low rated (J.St. 65)" commodities of a nature that "in order for any carrier to handle such traffic profitably, it must be handled in large quantities (J.St. 65)." Concluding that the new operation did in fact divert traffic from North Western and Soo Line (J.St. 65) it held J.St. 65-66) that:

> Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.
>
> Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connec-

tion making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection.

That these issues as well as the inventory of land, line and parts are crucial to the question of economic significance is revealed by the *Texas & Pacific* case,[4] relied upon by both the Commission (J.St. 47-50) and the lower court (J.St. 19-20). For there this Court, looking well beyond the length of line and industrial makeup of the area (270 U.S. 266 at 275), and the presence or absence of stations, schedules and telegraph service (270 U.S. 266 at 276) explained (270 U.S. 266 at 277-278) that:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *The New England Divisions Case*, 261 U.S. 184; *The Chicago Junction Case*, 264 U.S. 258; *Railroad Com-*

4. *Texas & Pacific Ry. Co.* v. *Gulf, C.&S.F. Ry. Co.*, 270 U.S. 266.

mission v. *Southern Pacific Co.*, 264 U.S. 331. The Act sought, among other things, to avert such losses.

Going beyond length of line and immediate investment, then, this Court squarely holds that the impact of the proposed construction upon traffic and revenues of existing carriers is an essential element of the economic equation inherent in Section 1(18). This, we submit, the Commission properly analyzed in affirming its duty to control such construction and in finding it inimical to the public interest guarded by that agency. Likewise, we submit that the District Court blurred this issue into obscurity by ignoring entirely the Commission's analysis and re-examining the jurisdictional issue *de novo* upon the mechanical basis recited in its opinion (J.St. 23-24).

By failing to distinguish its more limited role in reviewing the Commission's findings here from the findings which would have been required of it in an initial proceeding to enjoin the construction pending I.C.C. approval, the court erred by intruding without warrant into the administrative domain, under the teaching of *United States* v. *Drum*, 368 U.S. 370, 385-386;[5] *State of Illinois* v. *United States*, 213 F.

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5. Contrary to Appellee's contention (Motion to Affirm, p. 14), *Drum* involved the jurisdictional question of whether the subject carriers conducted for-hire operations, subject to I.C.C. control, or exempt private carriage. On the issue of the scope of judicial review of this jurisdictional finding this court held, 368 U.S. at 376 and 385-386:

> Because the Commission's resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedents so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission.
>
> • • •
>
> We think that such conclusions were well within the range of the responsibility Congress assigned to the Commission. The District Court explicitly recognized the propriety of the Com-

Supp. 83 (N.D. Ill. 1962), affirmed 373 U.S. 378 and *Public Service Comm'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed 323 U.S. 675.

The court below thus clearly substituted its judgment for that of the Commission upon an issue no longer open for *de novo* determination. This action requires reversal in the interest of achieving appropriate interaction between the federal courts and the regulatory agencies.

Respectfully submitted,

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February, 1964

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mission's inquiring into the substance of the arrangements. Yet the court's conclusion that "what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators," 133 F.Supp., at 281, rests on no articulated premise other than that Oklahoma did have control. If the court intended to hold that the Commission is confined to the "control" test, we think it clearly in error in view of the statutory objectives which we have set forth above. If, on the other hand, the court meant to substitute its judgment for the Commission's on the question of substance, we think that, on this record, it indulged in an unwarranted incursion into the administrative domain.

Reversed.

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No. 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

OPINIONS BELOW

The opinion of the District Court (R. 384-393)[1] is reported at 214 F. Supp. 244. The report of the Interstate Commerce Commission (R. 292-315) is printed at 307 ICC 311 and the Proposed Report by the Interstate Commerce Commission Examiner (R. 280-291) is unreported.

[1] The Transcript of Record herein is so identified.

JURISDICTION

The decree of the three-judge court (R. 393-396) was entered on June 18, 1963, and, after denial of post-trial motions by that court (R. 407-408), the Chicago and North Western Railway Company ("North Western") filed its notice of appeal (R. 408-411) in the district court on October 28, 1963. Probable jurisdiction was noted on March 9, 1964 (R. 411).

The jurisdiction of this Court rests on 28 USC 1253 and 2101(b).

STATUTES INVOLVED

The pertinent portions of Sections 1(18), 1(19), 1(20), 1(21), and 1(22) of the Interstate Commerce Act (49 USC 1(18-22) and are set forth in Appendix A to this brief.

QUESTION PRESENTED

After the Interstate Commerce Commission had affirmatively held that public convenience and necessity did not permit interconnection of the main lines of two Class I railroads at "Republic Junction," since it foresaw as a result of this interconnection potential preferences in divisions, car supply and other concessions to the most important shipper in the area, principal owner of one of those railroads, and certain harm by way of traffic division to existing railroads (R. 312-313) did the District Court exceed its function on review by examining the issue of I.C.C. jurisdiction *de novo* and by holding this subject "too small a matter to require the attention of the Interstate Commerce Commission?"

STATEMENT

This appeal involves a connection between two Class I railroads at "Republic Junction," Michigan (R. 97, Exs. 1 and 2)[2] built and placed in operation on October 21, 1957 without prior authority (R. 99). These railroads, Milwaukee[3] and LS&I,[4] had never before connected anywhere (R. 48 83, 106, 127, 209, 282, 294), so that there existed no through routes or joint rates for moving interstate rail commerce between them (R. 181, 19-20). Previously, rail cars originating at, or destined to, LS&I stations moved in interstate commerce via North Western or Soo Line.[5]

Soo Line immediately complained to the Interstate Commerce Commission ("the Commission") and ultimately lodged a formal complaint (in Finance Docket 20048) under Section 13 of the Interstate Commerce Act[6] (R. 16-21). As a result (R. 125), on March 27, 1958 Milwaukee and LS&I filed an application (in Finance Docket 20139 with the Commission requesting authority under Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)) to operate and interchange freight traffic[7] over the Republic Junction

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[2] Exhibits in the Commission proceeding are designated "Ex. ....."

[3] We so identify appellee Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

[4] We so identify appellee Lake Superior and Ishpeming Railroad Company.

[5] The Duluth, South Shore and Atlantic Railway Company, the original protestant here (R. 16-21) since then was renamed the Soo Line Railroad Company (R. 385).

[6] 49 U.S.C. 13.

[7] "Interchange" in railroad parlance means the transfer of cars between railroads of traffic moving over a through route.

connection (R. 24-27), together with a suggestion that the matter was not within the Commission's jurisdiction. Soon afterward (on April 9, 1958) Milwaukee and LS&I filed motions to dismiss their application (R. 28-33), suggesting various factual distinctions from similar circumstances in which trackage was held subject to the Commission's jurisdiction, notwithstanding the exemption of Section 1(22) of the Interstate Commerce Act (49 U.S.C. 1(22)).

A full hearing was held on the merits of the application (R. 93-224) and a considerable evidentiary record was taken (R. 225-279), which included (R. 105 and 106) the applicants' Applications (R. 24-27, 68-93) and their Return to Questionnaire (R. 37-68) filed previously with the Commission. North Western and Soo Line were permitted to intervene (R. 34, 35-36) and opposed the applications throughout. Undisputed on this record are the following facts:

1. Prior to the challenged construction, Milwaukee and LS&I had never connected anywhere (R. 48, 83, 106, 127 and 209), so that they had never interchanged traffic nor had they direct service or joint rates.

2. LS&I is controlled by the Cleveland Cliffs Iron Company, which owns over 75% of LS&I's common stock (R. 40, 125).

3. The construction was accomplished without notice to, or permission from the Commission (R. 16-23, 25, 125). Operations commenced on October 21, 1957 (R. 48, 124) between the main lines of Milwaukee and LS&I (R. 59).

4. The principal traffic moving over the Republic Junction interchange is forest products purchased from LS&I's parent (R. 43, 45, Ex. 5, 117, 126, 164, 170) Cleveland Cliffs Iron Co. ("Cleveland Cliffs") and shipped by rail to an industry located at Iron Mountain, Michigan (Ex. 7, R. 126, 127-128) although other

types of traffic also move (R. 126, 183-184, Ex. 5) and to other destinations (R. 115-116, Ex. 5, 116-121) both interstate and within Michigan (R. 338-339).

5. Prior to the connection, all of this traffic originating on LS&I to Iron Mountain moved via North Western (R. 126, 139, 156, 215). The principal shipper was entirely satisfied with the North Western and Soo Line service (R. 162), and even applicants knew of no complaints concerning the existing service (R. 110).

6. Rates paid by the shipping public are the same over this route, whether the service is performed by Milwaukee or North Western (R. 139, 169).

7. North Western provides rail service to Iron Mountain (R. 126, 120) which is competitive with that of Milwaukee (R. 134, 161).

8. All of the traffic now moving over the Republic Interchange could have been, and was in fact, handled by other railroads prior to October 21, 1957 (R. 45, 210-211, 217), and applicants expected no additional rail business to be generated by the new operation (R. 47, 83) and in fact the only new traffic generated in the territory came from an extension by LS&I at the other (east) end of its line (R. 133), not as a result of the Republic Junction connection.

9. The direct profit to applicants from the construction has been only incident to the elimination of intermediate carriers and dividing rates with those carriers for their services (R. 44). North Western and Soo Line are those intermediate carriers (R. 45, 126, 156, 160). They lost $664,866.44 in revenue up to March of 1960 over the new connection (R. 339).

10. The territory involved is one of very light traffic density (R. 139, 205) and the commodities moving there are all very low rated commodities (R. 128, 209). The comparative rates of return of the carriers involved demonstrate the importance of avoiding any

unnecessary diversion of revenues from North Western (Exs. 8, 9; R. 245-251).

11. The principal seller of forest products shipped over Republic Junction is LS&I's parent, Cleveland Cliffs (R. 154, 160, 176), and once the connection was established the rates from the Cleveland Cliffs shipping point, Sunrise Landing, were abruptly decreased (R. 130) to a level below that prevailing generally in the territory (R. 149-150), and LS&I at once began receiving revenue divisions from Milwaukee greater than it received from other connections (R. 140). Coincident with Cleveland Cliffs' financial interest in the entire transaction, then, the forest products traffic commenced moving over Republic Junction, so that North Western dropped to less than half of the traffic by the time of hearing (R. 211).

From this evidence the Commission's Examiner, having found (R. 280-291) that the Commission was empowered to rule on the merits, recommended approval, but, also, that Milwaukee and LS&I be prosecuted for constructing the connection prior to obtaining approval (R. 286), in violation of Section 1(18).

Division 4 of the Commission affirmed the violation, but found the interconnection incompatible with the public interest (R. 312-313).

The Commission's order was unambiguous. It held (R. 312-313):

> Since the record shows that a large number of shipments of saw logs and chemical wood have moved over the Republic Junction connection since its establishment in October 1957, whereas all that traffic formerly moved over the lines of other carriers in the area, it cannot be successfully contended that there has been no diversion of traffic as the result of the construction and use of the connection. Such diversion in this area of

light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.

Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing[8] of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connection making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection. In the circumstances, the section 1(18) application should be denied, and the supplemental application under section 5 dismissed.

The three-judge court entered a preliminary injunction (R. 365-368) against effectiveness of the I.C.C. order on

[8] But cf. item 11, on pages 5-6 *supra*.

June 13, 1960; then after two pre-trial conferences, and several rounds of affidavits it received briefs and heard oral argument, finally enjoining the I.C.C. order some three years later, on June 18, 1963 (R. 393-396).

Thus, Milwaukee and Ishpeming have actually been operating for over six years under the injunctions below, an operation for which the I.C.C. Examiner recommended that they be prosecuted and which the Commission affirmatively found was contrary to the public interest and in violation of Section 1(18).

SUMMARY OF ARGUMENT

The Transportation Act of 1920 (41 Stat. 456 at 477-478, as amended 49 U.S.C. 1(18)-1(20)), established a broad scope of federal control over interstate railroad expansion and contraction. In general, apart from the express exceptions of Section 1(22) of the Interstate Commerce Act, the rule was established that no interstate railroad could expand its track facilities in a manner adversely affecting other carriers without an Interstate Commerce Commission determination that such expansion was consistent with public convenience and necessity.

The decisions of this Court and the Interstate Commerce Commission establish that construction involving new railroad connections and interchanges resulting in additional through routes, such as the connection at Republic Junction involved in this proceeding, require Commission authorization based on its findings of fact and conclusions of law. The three-judge court misapplied these decisions and held that the "jurisdictional issue" required *de novo* determination. Thereafter, based on its independent evaluation of certain aspects of the evidence (R. 384 at 388-391), that Court summarily concluded that the connecting track at

Republic "is too small a matter to require the attention of the Interstate Commerce Commission (R. 391)," and enjoined the Commission order for want of jurisdiction.

By substituting its own standards (R. 391-392) for the Commission's analysis (R. 292 at 311-313), the three-judge court exceeded the scope of review properly accorded Commission decisions.

To the extent that the "*de novo*" determination by the court below finds support in *Powell* v. *U.S.* and *U.S.* v. *Idaho,* it must be noted that these decisions have been largely eroded by later decisions, are no longer applicable, and could with propriety be overruled. Further, the jurisdiction of the Commission finds full support in *Alabama & Vicksburg Ry.* v. *Jackson & E. Ry.*, 271 U.S. 244, and numerous cases based on its doctrine.

ARGUMENT

1.

The Existence of I.C.C. Jurisdiction over Trackage Construction and Operations Involved in the Creation of new Interstate Interchange Connections and Through Routes is Established in Alabama & Vicksburg Ry. Co. v. Jackson & E. Ry. Co., 271 U.S. 244.

The question of I.C.C. power to determine the desirability of a new railroad interchange seems at first blush entirely resolved by this Court's decision in *Alabama & Vicksburg Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244. There the court was compelled to construe the then-recent Transportation Act of 1920[9] to determine whether a new connection between the main lines of railroads engaged in interstate commerce was subject to I.C.C. jurisdiction under Section 1(18) Interstate Commerce Act or exempt, pursuant to Section 1(22). Holding the Section 1(22) exemption inapplicable (271 U.S. at 249-250) the Court explained clearly that:

> "The proposed junction is between the main lines of the two railroads. The point of junction is on the main line of the Alabama & Vicksburg, near its entrance into the City of Jackson. In support of the objection that a junction there would be dangerous, it was shown that the connection would be located between two trestles, near a highway crossing, on a curve, on a fill, and within the flood area of Pearl River. The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. *Moreover, the establishment of junctions between the*

[9] See page 8, *supra*.

main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction." (Italics supplied)

The italicized passage has been consistently construed as disposing to I.C.C. alone power over new interstate interchanges. The language permits no other construction.

a. *The Commission's Continuing Construction of Section 1(18) and the Alabama Decision Establishes its Jurisdiction Here.*

Since the *Alabama & Vicksburg* decision the Commission has uniformly taken jurisdiction of cases involving new connections between railroads, such as this, where new interchanges of traffic are involved.[10]

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[10] In *Toledo, P. & W. R. R.-Trackage Rights*, 307 I.C.C. 801 (1958) (not printed in full) North Western was held (over its motion to dismiss) to require a 1(18) certificate to operate (over 519.8 feet of track costing $25,468) a new interchange connecting its main line with that of T.P.&W., the Commission holding that "Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry* v. *Jackson Ry.*, 271 U.S. 244."

Similarly, in *Great Southwestern R. Co.-Construction* 295 I.C.C. 829 (1958) (not printed in full) the Commission granted Rock Island a certificate to operate a new interchange over an existing track 1.79 miles long and granted Texas & Pacific authority to build and operate over ½ mile of track a new interchange. Over a motion to dismiss, based on Section 1(22) the Commission held (at page 3 of the mimeographed decision in F.D. 19786) that

> the proposed line of the Texas & Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the con-

b. *Since State Agencies and Courts Accept This Construction, Repudiation of the Alabama Doctrine Would Create a Regulatory No-Man's Land.*

State courts and commissions agree too that a new interchange connection between the lines of interstate railroads lies within the sole power of the Interstate Commerce Commission under Section 1(18) as construed in *Alabama & Vicksburg* and that state commissions have no power to control such interchanges. The many decisions squarely in

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[10] *Continued*

struction and operation contemplated by the Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

Likewise, in *Chicago, B.&Q. R. Co.-Abandonment,* 267 I.C.C. 38 (1946) the Commission took jurisdiction of Burlington's application to construct a connecting track to Great Western, less than ½ mile long (and costing $50,858.00) and granted authority under Section 1(18). So too was authority granted under Section 1(18) for track segments 390 feet and 402.5 feet in length to connect and permit interchange of traffic between Santa Fe system lines in *Kansas City, M.&O. Ry. Co.-Construction,* 224 I.C.C. 157 (1937), and in *Switching at Dubuque, Iowa,* 210 I.C.C. 453 (1935) did the Commission assert power to control interchange of traffic over industrial track less than ½ mile long. Next, in *Lucas County Farm Bureau* v. *Chicago, B. & Q. R.R.,* 209 I.C.C. 489 (1935) the Commission, denying a Section 1(18) application to cause Burlington and Rock Island to construct a new interchange held (at page 489) that:

> "In *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.,* 261 U.S. 244, the Supreme Court of the United States held this Commission has exclusive jurisdiction to determine whether junctions may be established between the main lines of two railroads, both engaged in interstate commerce."

Identical in this respect also are *Charleston & W.C. Ry. Co.-Construction,* 166 I.C.C. 107 (1930) (where, over a motion to dismiss on jurisdictional grounds, the Commission sustained its jurisdiction under Section 1(18) to rule upon public need for a proposed 2 mile interchange between the lines of the two applicant railroads) and *Construction by D., G.H. & M. Ry.,* 124 I.C.C. 338 (1927); *Operation-Los Angeles & S.L. R.R.,* 124 I.C.C. 207, 211 (1927); and *Construction by T.P.&W. R.R.* 124 I.C.C. 278 (1927).

point are *Re Quality Limestone Products,* 16 P.U.R. 3d 205 (P.S.C. of Wisconsin 1956); *Board of Administration* v. *Chicago, B. & Q. R. Co.,* 138 Kan. 720, 27 P. 2d 550, 552 (1933); *Citizens of Pipestone* v. *Chicago, M. & St. P. R.R.,* 167 Minn. 174, 213 N.W. 534, 535-536 (1926), the latter an opinion on reconsideration, reversing a prior decision upon the basis of this Court's then recent decision in *Alabama & Vicksburg.* The high Minnesota court explained (213 N.W. at 535-536) that:

> "As we read this latest utterance of the Supreme Court, the compelling of a junction between two railroads, carriers of interstate commerce, so that cars may be transferred or routed from one to the other, as was petitioned for in the case at bar, comes within the sole jurisdiction of the Interstate Commerce Commission. We are unable to see any substantial difference in the situation presented here from that which existed in *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co., supra.*"

Thus, sustaining appellees' contention here would carve out from the otherwise complete regulation of railroads a no-man's-land comparable to that rejected here in *Guss* v. *Utah Labor Relations Bd.,* 353 U.S. 1, 10-12; and a lack of control completely contrary to the regulatory regime which Congress thought that it had enacted in the Transportation Act of 1920.[11]

c. *The Legislative History of the Transportation Act of 1920 and Prior Decisions of This Court Require Commission Jurisdiction Over Interchanges Between Interstate Railroads of the Character Here Involved.*

The District Court (R. 390) clearly erred in seeking to avoid the *Alabama & Vicksburg* decision by noting that the

[11] See page 8, *supra.*

applicants here did not extend their lines to a new terminus, so that there could [therefore] be no "extension" sufficient to activate Section 1(18). We submit that the test laid down by this Court and followed here by the Commission is not so simple.

First, this Court made it quite clear in *I.C.C.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 at 39, that

> an extension, though something other than a team, switching, industrial or side track, need not, in order to be distinguished therefrom, be a building into a new and previously unserved locality.

Thus, where an electric railroad (arguably also exempt by Section 1(22) from I.C.C. regulations) proposed construction of a connection which would have "become a connecting link in the new through route and effective line of connecting carriers which would be strongly competitive with existing trunk lines,"[12] in order to handle "pre-eminently interchange interstate freight traffic national in character,"[13] this Court held:

> The petitioner's railway is of such importance in interstate commerce and renders a service so predominantly devoted to the handling of interstate freight in connection with steam railroads, is in such relation to connecting steam carriers, and competes with steam trunk lines in such manner, that in view of the declared policy of the act we cannot hold it an "interurban" railway within the exemption of the same paragraph. The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from it sweep should be narrowed and limited to effect the remedy intended.

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[12] 286 U.S. 299, at 310.

[13] 286 U.S. 299, at 311.

Piedmont & Northern Ry. Co. v. *Interstate Commerce Commission*, 286 U.S. 299, 311, 312.

The Commission here carefully considered these competitive aspects, citing and guided by the leading decision in *Texas & N.O. R.R.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, where this Court restated once again (at page 479) that:

> The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *The Chicago Junction Case*, 264 U.S. 258; *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U.S. 331; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

This point is made emphatically in the legislative history of the 1920 Act.[14]

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[14] Mr. Esch, Chairman of the Commerce Committee and Manager in the House of H.R. 10453, which became the Transportation Act of 1920, explained (58 Cong. Rec. 8318) that "We can get better service by strengthening the existing line than by creating a rival or parallel line which would diminish the ability of the first line to make further improvements and betterments." And the SENATE-HOUSE CONFERENCE REPORT, H. Rep. 456 (66th Cong., 1st Sess.) stated clearly at page 18 that:

> "Section 402 further provides that extensions of an existing railroad or the construction of a new line, or the abandonment of a line shall not be permitted unless and until there shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction or abandonment. A like provision can be found in the statutes of a number of States. Your committee believes that the requirement of such a certificate, so far as extensions are concerned, will tend to stabilize existing conditions and prevent the construction of unnecessary or parallel lines which, without any reasonable hope of profitable operation, would become a burden to the public."

A further basic analytic error is the District Court's assertion (R. 390) that the *Alabama & Vicksburg* decision involved in addition to the proposed connection, an additional operation to a new terminus. This Court in that case had no such issue before it. It made perfectly plain (271 U.S. at p. 245) that the only such application had been *withdrawn* long before the connection case arose, and that trackage rights or no,

> the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the [Interstate Commerce] Commission has exclusive jurisdiction.
>
> *Alabama & Vicksburg Ry. Co.* v. *Jackson Ry. Co.*, 271 U.S. 244, 250.

Thus this Court's construction of Section 1(18) in just this context, holding that new interchanges between interstate railroads are subject to Commission jurisdiction and regulation should have been decisive here. All elements of the *Alabama & Vicksburg* decision were here present, as the Commission noted (R. 286). The record shows unequivocally that this was a brand new interchange between interstate railroads (R. 48, 83, 106, 127 and 209) which had never before connected anywhere (*ibid.*), new through routes on interstate traffic were thereafter established (R. 181, 183-185), and joint use of the involved tracks (R. 59) was involved from the beginning (R. 51-53, 79, 107-109). But for the District Court's erroneous application of the *Alabama* decision, Commission jurisdiction here would have been sustained.

2.

The Role Assumed by the Court Below is Redundant and Destructive of a Proper and Efficient Relationship Between Federal Courts and Administrative Agencies.

Appellees, in support of a *de novo* review, assert (at page 9 of their Motion to Affirm here—No. 710 in the prior term) that:

> The issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein.

To appraise the administrative waste inherent in this assertion, we must first review briefly the respective roles of agency and reviewing court in the area of railroad expansion, as established by Congress in 1920. Interstate railroads are prohibited from extending their lines or carrying on additional operations without a certificate from the Commission that public convenience and necessity permit the construction or operation. Section 1(18). After following the procedures laid down in Section 1(19), the Commission is empowered to grant such a certificate by Section 1(20), and, by the same provision, a federal court is empowered to enjoin construction or operation by a carrier which has not obtained such a certificate.[15]

If the carrier attempts such extension or operation without I.C.C. authority, the district courts are empowered by Section 1(20) to issue an injunction to compel a carrier to seek Commission approval, *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266. In doing so, the court

[15] The only exception to this provision is contained in Section 1(22) of the Act, exempting from Commission supervision "spur, industrial, team, switching or side tracks, located or to be located wholly within the State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

is required to determine in the first instance whether the action proposed by the carrier constitutes an "extension" under the teaching of *Texas & Pacific, supra.* The carrier may, of course, ultimately seek I.C.C. authority, as Milwaukee and L.S. & I. did here, in which case it is the duty of I.C.C. to determine affirmatively its jurisdiction over the transaction. *Yonkers* v. *United States,* 320 U.S. 685. The question then presented is what weight should a reviewing court accord I.C.C.'s finding of jurisdiction? The court below held that I.C.C.'s determination was incidental (R. 388) and tried the issue *de novo,* agreeing with appellees Milwaukee and L.S. & I. in their Motion to Affirm here,[16] that "[t]he issue in a section 1(20) proceeding is identical to the issue decided by the District Court herein."

But as this Court's decisions noted above show, the issue in a Section 1(20) case is whether a proposed construction program or operation has sufficient obvious earmarks of competitive or financial significance that a single judge should refer the matter to the Commission—elements so gross as to have no place in a proceeding to review a final Commission order.

A brief footnote illustration of the actual practice under Section 1(18) will best indicate what is now done.[17]

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[16] Motion to Affirm in No. 710 in the October, 1963 Term, at page 9.

[17] In *Chicago, Rock Island & P. R.R.* v. *Chicago and North Western Ry. Co.,* 188 F. Supp. 549 (S.D. Ill. 1960) defendant sought to build a 1.3 mile section of track to an industry near Peoria, Illinois, in a section served also by the plaintiff. Holding the competitive consequence of the proposed construction to be inconsistent with any "industry spur" contention (*id.* at 553) the court enjoined further construction pending issuance of a Commission certificate. When that certificate was ultimately issued, the same plaintiff sought review of the order in another court, this time one composed of three judges, pursuant to 28 U.S.C. 1336. *Chicago, Rock Island*

Thus the apparently elaborate tests stated by the one-judge courts[18] faced with the issue under Section 1(20) of whether to refer a case to the I.C.C. (i.e.—Will more that one industry be served? Will there be passenger or express service? Will there be a station, with or without telephone or telegraph service?) are really restatements of the Commission's Return to Questionnaire (R. 38-49). They are, if the Court please, the most rudimentary elements of the public importance—they are the basic grist from which the Commission must determine the impact upon carrier competitive and financial relations and, ultimately, whether public considerations permit the proposed operation. But the Commission's task under Section 1(18) is more complex than that of the single federal judge under Section 1(20). As the Commission recently restated (in *Nashville, C. & St.L.—Construction*, 295 I.C.C. 363 (1958)):

> Questions relating to jurisdictional matters of the nature raised by the applicant in this proceeding have been considered and discussed in numerous cases decided by us and by the courts. None of them prescribes any concrete rules or formulas whereby a line of railroad partaking of the nature of a spur, indus-

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[17] *Continued*

& P. R.R. v. *United States*, 205 F. Supp. 378 (N.D. Ill. 1962). Refusing to try the matter *de novo* (*id.* at 383), that court upheld the Commission order after determining (*id.* at 384) that the order was reasonable and supported by substantial evidence, the customary scope of review in such cases. Note further that other courts have found it impossible to intervene by enjoining I.C.C. hearings under Section 1(18) where a party contends against the Commission's jurisdiction, holding that until the Commission has determined, after hearing, whether it possesses power in the premises it would be improper for the courts to attempt to decide the jurisdictional issue. *Michigan Public Service Comm'n.* v. *United States*, 162 F. Supp. 677 (W.D. Mich. 1958).

[18] E.g., *Pennsylvania R. Co.* v. *Reading Co.*, 132 F. Supp. 616, 621-622 (E.D.Pa. 1955); *New York Central Ry. Co.* v. *Norfolk & W. Ry. Co.*, 214 F. Supp. 549, 553 (S.D. W.Va. 1963).

> trial, or switching track, may be easily distinguished from an extension of a line of railroad. The line of demarcation between them has been closely drawn in many instances, and the question of our jurisdiction has been determined in the light of the factors peculiar to each individual case. These include, among other things, matters pertaining to the purpose of the track sought to be constructed and the use to be made of it; the question whether new routes in interstate commerce would be established through the use of such track; and whether the construction and operation of the proposed track would constitute an invasion of another carrier's territory.

Reviewing the Commission's decision there, after it determined affirmatively on the jurisdictional question, the three-judge reviewing court in *State of Georgia* v. *United States,* 156 F.Supp. 711 (N.D.Ga. 1957) was seemingly uncertain at first of the scope of review to be accorded the jurisdictional finding (156 F.Supp. 713). Nevertheless, in an opinion affirmed here (356 U.S. 273), the court held (156 F.Supp. at 717):

> We think it clear that if the proposed construction offers a substantial threat in a "preservation of the earning capacity, and conservation of the financial resources" of either the proponent of the new trackage or of the existing carrier it may become "a matter of national concern"; if there is a substantial doubt that "the property employed" (and this must mean the property employed by both the new and the old carriers) will "earn a reasonable return," or that it constitutes an unneeded duplication and that "the building of unnecessary (i.e., duplicating) lines involves a waste of resources" whose burden may fall upon the public"; and if the type of competition that would result "may result in harm to the public as well as in benefit," or that the injury to its rival may cause the public ultimately to bear the loss then the Act

> sought, among other things, to avert such results. This is the clear teaching of the *Texas & Pacific* case.
>
> • • • • •
>
> Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well.

These questions, we respectfully submit, are of a quality quite different than those in the Return, and those in a Section 1(20) injunction case. And upon these issues of transportation economics the courts ought properly to defer to the Commission's refined resolution issues as to which judges, by virtue of their training and experience, can hardly be deemed more knowledgeable. By seizing on a "jurisdictional" issue to displace the Commission's findings and judgment, the District Court exceeded the proper bounds of judicial review. We think its action here incompatible with this Court's decision in *City of Yonkers* v. *United States,* 320 U.S. 685, for the Court there made it plain that an I.C.C. order under Section 1(18) could not be sustained without an express finding by the agency that it had jurisdiction over the line in question. The decision is unequivocal, the Court declaring (320 U.S. at 689, 691-692) that:

> ". . . we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission."
>
> • • •
>
> "The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded.

> It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject."
>
> • • •
>
> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Unless, to paraphrase Mr. Justice Frankfurter, "[t]he agency is made to serve as a circumlocution office."[19] the *Yonkers* decision is positively repugnant to the lower decision here. Indeed, more recent decisions point clearly toward acknowledging the Commission's role in such determinations by limiting review of these "jurisdictional" fact findings to the review normally accorded administrative agencies. Clearly in point on this precise issue is *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, where I.C.C. had determined that the subject carrier was not within the "interurban" exemption of Section 152, Eighth of 45 U.S.C., and thus subject to federal regulation of its employment practices. After the three-judge district court had tried the jurisdictional issue *de novo*, this Court reversed, holding that it had exceeded the permissible scope of review of the I.C.C. order. Unambiguous, indeed, is this decision (305 U.S. at 184-185):

> "What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except inter-

[19] *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 518 (Frankfurter, J., dissenting, joined by Justices Burton and Harlan).

urban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho,* 298 U.S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (id., p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U.S. 541, 547; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.,* 227 U.S. 88, 91; *Virginian Railway Co.* v. *United States,* 272 U.S. 658, 663; *Tagg Bros. & Moorhead* v. *United States,* 280 U.S. 420, 444; *Florida* v. *United States,* 292 U.S. 1, 12; *St. Joseph Stock Yard Co.* v. *United States, supra.*

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission. [footnotes omitted]."

• • •

"We conclude that the District Court erred in permitting a trial *de novo* of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint."

A significant number of three-judge district courts have now been persuaded that this Court meant what it said in *Yonkers,* and that since an I.C.C. finding of jurisdiction is mandatory in a 1(18) case, it should be accorded the weight on review which is customarily accorded administrative determinations. Most recently, in *State of Illinois* v. *United States* 373 U.S. 378, the Court affirmed summarily the decision of a three-judge court which, following *Yonkers,* had held (213 F. Supp. 83 at 88) that:

> "The opinion [in *United States* v. *Idaho,* 298 U.S. 105] by Justice Brandeis, while acknowledging that the district court had jurisdiction to determine the classification of the Oregon railroad, did not deny that the determination of the Commission should be given great weight. It merely concluded that the ultimate decision was left to the courts and not to the Commission.
>
> In *City of Yonkers* v. *United States,* 320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400 (1943), the Supreme Court was again called upon to review the findings of a district court in determining whether certain operations of the New York Central fell under the exception of Section 1(22). Although agreeing with Justice Brandeis that the determination of what is included within the exemption of Section 1(22) involves a 'mixed question of fact and law,' the Court nevertheless concluded that the Commission should first determine whether the railroad falls within its jurisdiction. In recognizing the importance of the Commission's findings, the Court said at pages 691-692, 64 S.Ct. at pages 330-331:
>
> > 'It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission had a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for de-

termining through application of the statutory standards the appropriate line between the federal and state domain. * * * The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safe-guarded. *It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.*

* * *

'This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.' (Emphasis supplied.)

The case was remanded and the Commission held that it had jurisdiction after it had made detailed subordinate findings of fact. The district court affirmed, *Public Service Commission of New York* v. *United States, D.C.*, 56 F.Supp. 351, and on review the Supreme Court sustained, 323 U.S. 675, 65 S.Ct. 130, 89 L.Ed. 548 (1944). The Court stated at page 675, 65 S.Ct. at page 130:

'On remand of the case * * * to the Interstate Commerce Commission for further findings, the Commission reopened the case, took further evidence, and made additional findings. Upon examination of the case now here on appeal we conclude that those findings are sufficient to support the order, and the evidence is sufficient to support the findings. The judgment is affirmed.'

We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doc-

trine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized [emphasis supplied]."

That the district court in *Yonkers* likewise so understood the Court's remand opinion is clear from its second opinion on review of the second I.C.C. order, *sub nom. Public Service Com'n. of New York* v. *United States*, 56 F.Supp. 351 (S.D. N.Y. 1944), affirmed *per curiam* 323 U.S. 675. The district court read the *Yonkers* opinion as entitling the I.C.C. jurisdictional finding to "at least prima facie weight."[20]

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[20] At page 353 of 56 F. Supp. the Court explained that:

"In the light of these previous proceedings, the crucial question before us is, of course, the jurisdiction of the Commission to enter the abandonment order."

* * *

"Such findings, both subordinate and ultimate, surely meet the criticisms of the previous order by the Supreme Court; and, since they were the express objective of the Supreme Court's order of reversal, they must be entitled to at least prima facie weight in our considerations here.
Actually, the effect to be given by the courts to administrative findings of 'jurisdictional facts' is not clear, as, indeed, the majority and minority opinions rendered by the Supreme Court in the present proceedings show."

* * *

"Where, as here, a court is asked to review an order of the Commission issued upon application for a certificate of public convenience and necessity under § 1(18), the initial validity of which is premised upon the existence of basic jurisdictional findings by the Commission, there must of necessity be some amelioration of the doctrine that the question of jurisdiction is for the independent judgment of the court. Otherwise it would hardly have been necessary to return the case for such findings. Indeed, in the light of at least some precedents, we were coming to think that review of 'jurisdictional' and 'constitutional' facts was more limited than had earlier been thought. *Gray* v. *Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L. Ed. 301; *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 59

That these cases are not unique aberrations in this Court's doctrine of judicial review is revealed by its decision in *United States* v. *Jones*, 336 U.S. 641, 664, where it alludes to *Shields*, a keystone of our position, as foundation for "the general rule which gives administrative determinations in such matters presumptive weight (336 U.S. at 664)." This rule, we contend, should have been applied here, where I.C.C. twice ruled affirmatively upon its jurisdiction over the extended line[21] only to have its efforts sloughed off as "incidental".

Undeterred by the verbalism of "jurisdictional fact," we submit that the essential issue is whether this interchange connection raises an issue of national import involving the substance of Section 1(18)—if so, the Commission correctly intervened. The Commission held (R. 298, 312-313) that this connection did raise issues of national transportation significance; it reiterated that view explicitly to the District Court below (R. 398-404 at 404)[22] and in this Court the Solicitor General advances in that position (Memorandum for the United States and the Interstate Commerce Commission in No. 710 of the prior term at pages 5-7).

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[20] *Continued*

S.Ct. 160, 83 L.Ed. 111; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73, 56 S.Ct. 720, 80 L.Ed. 1033; *Steamship Terminal Operating Co.* v. *Schwartz*, 2 Cir., 140 F. 2d 7; Brown, Fact and Law in Judicial Review, 56 Harv. L. Rev. 899, 925; Landis, The Administrative Process, 1938, 126-135; 41 Yale L.J. 1037; 46 Harv. L. Rev. 478; 80 U. of Pa. L. Rev. 1055; 22 Corn.L.Q. 515."

[21] R. 284-286, 296-299. Indeed, so clear was this issue to the Examiner, that he recommended that the matter be referred to the appropriate U.S. Attorney to prosecute Milwaukee and L.S. & I. for failure to obtain approval for this operation (R. 286).

[22] The Commission and the United States stated:

We submit, contrary to the Court's statement.... the matter in question is of national concern (R. 404).

Judge Friendly, of the Second Circuit, in a recent opinion on this same point resolved this question in *Long Island R.R.* v. *New York Central R. Co.*, 281 F.2d 379 (1960). His reasoned ruling (*id.* at 383-384) is worthy of quotation:

> Appellants argue this administrative construction should not receive its customary weight because of the holdings, cited above in our discussion of the jurisdiction of the District Judge, that under § 1(20) the enjoining of extensions or abandonments which the Act prohibits without a certificate is for the courts rather than the Commission. However, it hardly follows from this that Congress would not wish the courts to give appropriate heed to a long-standing and consistent interpretation by the Commission in the discharge of duties confided to it. Section 1(18) cannot be deemed wholly forbidden ground to the Commission. Often the Commission must construe and apply § 1(18) directly, as it would have had to do here if the Central has petitioned for a certificate and then moved to dismiss the petition for want of jurisdiction, see *Lehigh Valley R.R. Conditional Sale Contract*, 233 I.C.C. 359 (1939); *Davidson Transfer and Storage Co. First Mortgage*, 282 I.C.C. 521 (1952). And, despite some of Mr. Justice Butler's language in *Powell* v. *United States, supra*, we cannot believe the Commission is under a mandate to remain mute in an investigation and suspension proceeding as to whether the tariff contemplates action which the Commission believes it will be bound to seek to enjoin under § 1(20). So far as concerns the relative roles of court and Commission, we see little distinction between § 1(18) and § 20a, relating to the issuance of securities. There also decision whether Commission authorization is needed is ultimately for the courts in civil or criminal proceedings, but weight has been given not only to positive administrative construction, *United States* v. *New York, New Haven & Hartford R.R.*, 2 Cir., 1959, 276 F.2d 525, 530-31, certiorari denied. *Tri-Continental Financial*

Corp. v. *U.S.*, 1960, 362 U.S. 961, 80 S.Ct. 877, 4 L.Ed. 2d 876 but also to long-standing administrative inaction, *United States* v. *Chicago North Shore & Milwaukee R.R.*, 1933, 288 U.S. 1, 53 S.Ct. 245, 77 L.Ed. 583.

His reference to Section 20a and the *North Shore* case (of 288 U.S.) recalls this Court's resolution of the *Shields* case[23] and the more recent *North Shore* case (373 U.S. 378),[24] sustaining I.C.C.'s jurisdictional findings upon the review customarily accorded agencies in reviewing courts. These recent decisions, testing whether the agency decision comports with the body of administrative and judicial precedents so far developed in this area, themselves harmonize with this Court's recent expressions in this area,[25] and promote the most constructive accommodation between agency and Court in an exceedingly complex area of economic regulation.

3.

Although this Court's Decisions in Powell v. United States and United States v. Idaho have been Largely Eroded, the Avoidance of Continuing Confusion would Warrant their being Overruled.

Candor requires recognition of two incompatible lines of decisions by this Court, one holding that the issue of I.C.C. jurisdiction over extension or abandonment of rail line is a "mixed question of law and fact," susceptible of *de novo* determination in a reviewing court;[26] the second, holding that the I.C.C. must determine its jurisdiction in a case in-

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[23] Pages 22-23, *supra*.

[24] See pages 24-26, *supra*. The latter "North Shore" case, of course, was captioned *State of Illinois* v. *United States*.

[25] E.g., *United States* v. *Drum*, 368 U.S. 370 at 376 and 385-386.

[26] *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

volving railroad expansion or contraction,[27] and that this Commission determination is entitled to presumptive weight on review, which review is limited to testing the adequacy and sufficiency of the Commission findings.[28] The former line of these decisions could appropriately be overruled, in the interest of conserving judicial and administrative resources and establishing a greater semblance of harmonious interplay between the courts and regulatory agencies whose activities they review. The court below followed the former line of cases, by determining *de novo* the issue of I.C.C. jurisdiction over the rail construction in issue, a holding incompatible with the more recent and, we submit, better reasoned decisions of this Court.

Both *Powell*[29] and *Idaho*,[30] *supra*, appear to hold that I.C.C. has no power to determine its jurisdiction over a proposed extension or abandonment, that instead this is a "mixed question of fact and law" upon which the court, not the Commission, must speak. Both cases involved review of I.C.C. determinations, and in both the jurisdictional issue was determined *de novo*. The conflict seems clear.

But this "law-fact" formula has long since been discarded,[31] and the *Powell-Idaho* doctrine, we submit, cannot be held to have survived the decisions from *Yonkers* through *Drum* noted at pages 21-29, *supra*. For this reason,

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[27] *Yonkers* v. *United States*, 320 U.S. 685.

[28] *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177; *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D. Ill., 1962), aff'd. 373 U.S. 378; *Public Service Com'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), aff'd. 323 U.S. 675.

[29] 300 U.S. 276 at 287-288.

[30] 298 U.S. 105 at 109.

[31] *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *United States* v. *Drum*, 368 U.S. 370, 376; 4 Davis, *Administrative Law Treatise* §§ 30.01-30.11.

a proper recognition of present doctrine would warrant that the *Powell* and *Idaho* decisions be overruled.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with instructions that the complaint be dismissed.

Respectfully submitted,

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August, 1964

APPENDIX A

Section 1(18) through 1(22) of the Interstate Commerce Act (49 U.S.C. 1(18)-1(22), 4 (Stat. 477-478, as amended) provides:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter

provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate

facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 21

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees,

On Appeal From The United States District Court
For The Eastern District Of Wisconsin

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

I.

Whether the three-judge District Court below correctly construed and properly applied § 1(18) of the Interstate Commerce Act, requiring Commission approval for an extension of railroad line, and § 1(22), exempting switching tracks from the Commissions § 1(18) authority, to the facts regarding the 262 foot crossover track connecting the Milwaukee and Ishpeming main lines and used solely for switching freight cars to be interchanged between them

and holding that the track is a § 1(22) switching track, not a § 1(18) extension of their respective lines of railroad, and therefore is outside the Commission's power under § 1(18) to permit or forbid.

II.

Was the proper function of the three-judge District Court below to construe § 1(22) of the Interstate Commerce Act, exempting construction of "spur, industrial, team, switching or side tracks" from the Commission's power under § 1(18) to permit or forbid, and notwithstanding the Commission's decision to the contrary, to decide that construction and operation of the 262 foot connecting track used only for switching interchange cars between the Milwaukee and the Ishpeming is not a § 1(18) extension of a line of railroad, but is within the ambit of § 1(22); or must a Federal court defer to the decision of the Interstate Commerce Commission that the connection is an extension of a line of railroad within its jurisdiction under § 1(18) of the Act?

STATEMENT OF THE CASE

This is a direct appeal under 28 U.S.C. § 1253 from the judgment of a three-judge District Court (R. 393) which set aside and annulled an order of the Interstate Commerce Commission (R. 314) denying an application under § 1(18) of the Interstate Commerce Act to continue interchange operations over a railroad track connecting the lines of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee" herein) and the Lake Superior and Ishpeming Railroad Company ("Ishpeming" herein).

A. The Connecting Track

On October 21, 1957, the Milwaukee and Ishpeming began interchanging freight cars over Republic Junction, a

new track connecting their main lines of railroad about two miles north of the town of Republic, in the Upper Peninsula of Michigan, where their rights of way are contiguous and parallel (R. 99, 385). The District Court described this connection as ". . . simply a crossover track between plaintiffs' respective railroads. It comprises two switches or turnouts, one in each of plaintiffs' lines, which are connected by 262 feet or approximately 0.05 miles of track." (R. 385, 294). This crossover is designated "A-C" on the plat of the interchange tracks (Applicants' Ex. 3; R. 228, 114).

In addition to the connection two side tracks, designated "D-E" on the plat of the interchange tracks were constructed parallel to the main line track of the Ishpeming (Applicants' Ex. 3; R. 228, 114, 294-295). These sidings are not essential to the connection and are irrelevant to this litigation. Their sole operational function, as the lower court noted (R. 385), is to provide tracks on which cars to be interchanged may be delivered by the Milwaukee or the Ishpeming and parked temporarily off of the main lines of both railroads until they are picked up by the carrier receiving them (R. 100-101) and to facilitate the various locomotive movements required for that operation (R. 295-296). Section 1(22) of the Interstate Commerce Act expressly exempts sidings from the requirements of § 1(18).

The cost of the new tracks was approximately $28,690.00 which was shared equally by the Milwaukee and Ishpeming (R. 101, 385) pursuant to a contract (Applicants' Ex. 4; R. 230, 231, 114).

B. The Litigation Preceding This Appeal.

On January 8, 1958, the Duluth, South Shore and Atlantic Railroad Company, now the Soo Line Railroad,

filed a complaint with the Interstate Commerce Commission alleging that the connection was an "extension" of the respective lines of railroad of the Milwaukee and Ishpeming and, therefore, that a § 1(18) certificate of public convenience and necessity was required for its construction and operation but had not been obtained prior thereto (R. 16). It requested the Commission to compel compliance by the Milwaukee and Ishpeming with §§ 1(18)-1 (22) of the Act (R. 20-21). This proceeding was docketed by the Commission as Finance Docket 20048.

As the lower court (R. 386) and the Commission (R. 293) correctly observed, appellees' answers averred that the connecting track was not an extension of a railroad line under § 1(18), but that it was a switching track within § 1(22) and, therefore, that the Commission had no jurisdiction over it.

To comply with a suggestion of the Commission and to obviate the substantial penalties which might be exacted in the event the Commission's suggestions were correct, the Milwaukee and Ishpeming jointly filed an application for a § 1(18) certificate of public convenience and necessity permitting continuance of their interchange operations over the connection (R.24). They also filed a motion to dismiss their application on the ground the track was not a § 1(18) extension, but within § 1(22) of the Act (R. 28). The Commission docketed the application proceedings as Finance Docket 20139. The North Western and the Duluth intervened in opposition to the application (R. 34-35, 35-36).

The Commission consolidated the complaint and application cases and, after hearing, entered its Report and Order on September 25, 1959 (R. 292-314), holding that the Republic Junction connection was an "extension" of appel-

lees' respective lines of railroad within the Commission's § 1(18) jurisdiction and overruling the motion to dismiss the application (R. 315). The Commission also found that public convenience and necessity did not require the connection and ordered appellees to cease operating over the interchange tracks (R. 313-314)

On May 17, 1960, after the Commission had denied a petition for reconsideration (R. 316), appellees sued in the lower court to review, and to annul, set aside and enjoin the enforcement of, the Commission's orders on the grounds that the connection was a § 1(22) track outside the Commission's jurisdiction and, if not, that the Commission's denial of the certificate applied for was contrary to the evidence of record (R. 1-12, 387). On June 13, 1960, after notice and hearing on appellees' motion (R. 333-334, 359-360), the three-Judge District Court issued a preliminary injunction (R. 365) preserving the *status quo* existent since the opening of the connection against any attempt to enforce the Commission's orders pending final disposition of the cause. Pursuant thereto the connection has remained open, and interchange operations thereover have continued.

On October 15, 1962, during the pendency of this litigation in the court below, the Commission on its own motion entered an order in the proceedings previously before it which, *inter alia,* discontinued the complaint case, Finance Docket 20018, and reaffirmed the Commission's previous orders in the application case, Finance Docket 20139 (R. 378-379).

By its decree of June 18, 1963 (R. 393-396), the three-Judge district court reversed, annulled and set aside the Commission's order on the basis of its opinion (R. 384-393) that the connection was not an "extension" within the pur-

view of a § 1(18) and, therefore, that the Commission had no jurisdiction to entertain the § 1(18) application. In so deciding the lower court did not reach the question whether the Commission's finding that a § 1(18) certificate was not required by public convenience and necessity was supported by evidence of record (R. 392).

SUMMARY OF ARGUMENT.

I.

Section 1(18) of the Interstate Commerce Act requires approval of the Interstate Commerce Commission prior to construction or operation of an "extension of a line of railroad"; § 1(22) exempts "switching tracks" from that requirement and thereby removes switching tracks from the § 1(18) jurisdiction of the Commission. *Western & Atlantic* v. *Public Comm.*, 267 U.S. 493, 497 (1925). A. Although the Commission correctly found on the evidence that the Republic Junction connection was a switching track by virtue of the operations conducted over it, the Commission misconstrued those sections of the Act by finding, contrary to its own precedent, that the connection was a § 1(18) extension. It should have found the track was a § 1(22) track and granted appellees' motion to dismiss the § 1(18) application. *St. Louis, S. F. & T. Ry. Co. Trackage Rights*, 267 I.C.C. 30 (1946).

B. 1. The North Western misconceives the effect of *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926) by arguing it controls the Commission's § 1(18) jurisdiction over the connection. It does not, because it held only that the Commission's jurisdiction was exclusive (a) where interstate commerce would be imperiled physically by the new operation and (b) to compel construction of new tracks under § 3(4) and § 1(21) of the Act, a power not applicable to the voluntary undertaking of appellees.

B. 2. The Government's Memorandum, as did the Commission's Report, incorrectly says the connection "invades" territory of the North Western and Soo Line under *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926). But, (a) not only do the facts of that decision distinguish it from Republic Junction, (b) not a single element held essential to such an invasion (c) is present in this litigation, because the connection neither goes anywhere served by the other railroads nor (d) can "invasion" under that decision occur elsewhere than at Republic Junction because it enables no railroad service which would not otherwise be available or which would tap sources of traffic exclusively served by other railroads.

C. Both the North Western and the Government contend that the competitive effects of the Connection make it a § 1(18) extension and place it within the Commission's power to permit or forbid. 1. This is not possible by means of trackage rights because neither the Milwaukee nor Ishpeming has acquired trackage rights over the other's railroad. For this reason trackage rights cases asserting Commission jurisdiction over connections implementing the use of trackage rights are not in point. 2. Nor do the new through routes over the connection make it an extension of line, because a § 1(18) extension must be a physical extension of track, not merely an arrangement for through transportation. Equating the two concepts would enlarge the Commission's power beyond that delegated to it by Congress. 3. Competition between railroads is not unlawful *per se*, and the economic injury, if any, to other railroads is a result of appellees' improvement of the transportation service they offer to the public, a concept radically different from an extension of a railroad.

On review the lower court acknowledge these distinctions between this case and the *Alabama* and *Texas*

decisions and the inapplicability of any theory based on competition. It correctly held the connection was a § 1(22) track because of the characteristics of the operations conducted over it and its relative insignificance.

II.

A. The North Western throughout its argument reiterates its view that the lower court proceeding was a *de novo* adjudication of whether the connection is a § 1(18) extension or a § 1(22) switching track, made without regard, or without sufficient regard, for the Commission's finding that the track is an extension. On the contrary, the litigation below constituted a review of the jurisdictional finding of the Commission on the record made before the Commission and with extensive consideration of the Commission's contentions as to its § 1(18) jurisdiction. The proceeding complied in every respect with the review the Court was required to make under § 10 of the Administrative Procedure Act, to correct an error of law made by the Commission. *Public Serv. Comm.* v. *United States*, 356 U.S. 421 (1958).

B. The North Western confuses undisputed evidentiary facts found by the Commission with the Commission's conclusion that it has § 1(18) jurisdiction over the connection. The same standards of judicial review do not apply to both; the Commission's jurisdictional conclusion may be questioned on review and the error of law on which it is grounded corrected. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943).

C. In any event, the question before the lower court whether Republic Junction is a § 1(18) extension or a § 1(22) switching track was one of statutory construction to ascertain which of those provisions applies to the un-

disputed physical facts found. Such an inquiry is clearly appropriate for a court. *Labor Board* v. *Highland Park Co.*, 341 U.S. 322 (1951). The North Western's argument that the Commission's finding as to its jurisdiction is conclusive was settled beyond doubt by this Court's rejection of similar arguments in *Texas & Pac. Ry.* v. *Gulf. Etc.*, 270 U.S. 266, 272 (1926), and *United States* v. *Idaho*, 298 U.S. 105, 109 (1936).

D. The Federal courts, not the Commission, are ultimately charged with the duty to define the Commission's jurisdiction regardless of the proper weight to be accorded the Commission's finding. *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956). A reviewing court may always question whether an agency has acted within the scope of its delegated powers.

E. *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177 (1938), relied upon by the North Western, is not in point because the Commission's determination therein was one of fact to serve as the basis for further administrative proceedings by another agency. The duty to make such a factual determination was delegated to the Commission by Congress in an Act other than the Interstate Commerce Act; it was not left for the courts to decide as is the question whether a track is a § 1(18) extension or a § 1(22) switching track. Determinations made under a different statute have no authorative weight in the decision of the question at bar.

III.

The outright reversal of the lower court requested by the North Western is improper because there remains another issue to be decided by the lower court in the event the judgment below is not affirmed.

ARGUMENT

I.

The Nature of the Connection Makes It, as the Lower Court Held, a § 1(22) "Switching Track" Exempt From the Jurisdiction Asserted Over It By the Commission Under § 1(18).

Section 1(18) of the Interstate Commerce Act, sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U.S.C. § 1(18), as amended,[1] requires a carrier undertaking an extension of its line of railroad by construction or acquisition to first obtain a certificate from the Interstate Commerce Commission that the present or future public convenience and necessity requires it. Section 1(22) of the Act, enacted in the same section of the Transportation Act of 1920, 41 Stat. 478, 49 U.S.C. § 1(22) (Appendix A, page 3a), exempts from the Commission's § 1(18) authority ". . . the construction or abandonment of spur, industrial, team, switching or side tracks . . ." The question whether the Commission has § 1(18) jurisdiction over a track depends on whether the track is an "extension of a line of railroad" under § 1(18) or is within the purview of § 1(22). *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Western & Atlantic* v. *Public Comm.*, 267 U.S. 493, 497 (1925).

The crucial question now before this Court, as it was before the district court, is whether the Commission in its Report and Order (R. 292) properly assumed jurisdiction, on the ground the connection is a § 1(18) exten-

[1] The text of the relevant statutes cited herein are set out in Appendix A. Section 1(18) is at page 1a.

sion, to entertain and decide whether public convenience and necessity required the track. If so, the lower court may be reversed; but if, as we believe, the connection is a switching track within § 1(22), the Commission had no power to entertain and decide the public convenience and necessity question, and the judgment here appealed from should be affirmed.

A. The Commission Correctly Concluded That the Switching Operations Over the Connection Made It a Switching Track But Contradicted Itself By Assuming §1(18) Jurisdiction Over It

1. The District Court and the Commission Correctly Found That Only Switching Operations Were Conducted Over the Connection.

The record is replete with evidence that, as both the lower court (R. 389) and the Commission (R. 298) observed, the Republic Junction connection is used solely as a switching track for switching cars to be interchanged between the Milwaukee and Ishpeming. The Commission's Report and Order paraphrased witness Crippen's testimony (R. 100-101) describing the operations over the track (R. 295):

> "The interchange service at Republic Junction is generally performed in the following manner: Milwaukee's northbound train No. 69 carrying cars for delivery to the Ishpeming is stopped just south of the switch at the crossover track. Here the train is broken and the engine pulls the cars for delivery to the Ishpeming over the crossover track and places them on track 1. The engine is then disconnected from the cars and returns to the train over track 2 or the Ishpeming's main line whichever is more convenient."

The Milwaukee's southbound train performs a similar switching operation (R. 101, 295), and the Ishpeming's

trains operate in about the same manner but do not use the crossover (R. 131, 295-296).

The Commission recognized that this operation is, as the lower court held (R. 392), a switching operation and stated in its Report (R. 298): ". . . the physical movement of the cars from the line of one carrier to the other is, as contended by defendants, a switching movement . . ."

The Milwaukee locomotive uses the Ishpeming's main line track only for operational convenience and solely to return to the Milwaukee's main line after delivering cars on the interchange sidings in accordance with common railroad practice in switching interchange cars (R. 107-108). Such cars are not classified for delivery to their ultimate destination before placement on the interchange tracks; their only prior classification is for the limited purpose of delivery to the receiving railroad (R. 104-105).

Such an interchange operation is not a "train movement". A train is an engine and cars assembled and coupled together for a trip or run over a railroad, *United States* v. *Erie R. R.*, 237 U.S. 402, 407 (1915), and does not shift cars about in a yard or on isolated tracks devoted to switching operations, *United States* v. *Chi., Burl. & Q. R. R.*, 237 U.S. 410, 412 (1915). No line haul movements are conducted over the connection; only switching movements to deliver or pick up interchange cars. Since no train moves from an origin point on the Milwaukee or Ishpeming via the connection to a destination point on the line of the other railroad, there is no through movement over the connection.

The record does not justify the Commission's finding that switching movements over the connecting track are actual parts of "the through movement of the traffic" (R.

298). The Commission found that the movements over the connection constitute a "mere switching operation" (R. 298). The connection itself, therefore, is no more than a "switching track" exempt, as the lower court held (R. 392), by the terms of § 1(22) from the Commission's § 1(18) jurisdiction. The short length of the connection (R. 294) and its nominal cost (R. 101) make it as insignificant as the district court held it to be (R. 391).

2. The Commission Disregarded Its Own Precedent By Holding the Connection Was a § 1(18) Extension.

Contrary to its finding that operations over Republic Junction are switching movements, the Commission assumed jurisdiction over the connecting track on the ground it was an "extension of line" within the Commission's § 1(18) power to permit or forbid. This assertion is pointedly contrary to Commission decisions exemplified by the cases cited below in which the Commission declined to take jurisdiction under § 1(18) because "switching operations" over proposed tracks constituted them "switching tracks".

Wisconsin Power & Light Co. v. *Chicago & N. W. Ry. Co.*, 220 I.C.C. 475 (1937), involved the power company's complaint to compel the North Western to establish a switching connection with an electric railway over which the power company already had trackage rights. The complaint alleged the North Western's refusal to connect violated §§ 1(9) and 3(3) of the Interstate Commerce Act, and the company also applied for a § 1(18) certificate permitting the connection. Although the Commission sustained the complaint, it dismissed the § 1(18) application on the ground the character of the connecting track did not place it within the purview of § 1(18).

In *Texas & P. Ry. Co. Operation*, 247 I.C.C. 285 (1941), a § 1(18) certificate was applied for to authorize construction of connections 525 feet and 5,000 feet long, respectively, which with trackage rights over two other railroads would provide applicants a direct interchange connection with three railroads never before connected with them. Finding that the proposed trackage would expedite traffic movement, develop competitive routes, provide more dependable service, facilitate car interchange and eliminate using ferries to cross a river, the Commission described the tracks to be: ". . . for the sole purpose of conducting switching operations", 247 I.C.C. 291, and, dismissing the application, held that such use may be effected without Commission approval.

The Commission's Report in *Central R. Co. of New Jersey Trustees Acquisition*, 254 I.C.C. 344, 348 (1943), described an interchange operation over a proposed connecting track similar to the operation over Republic Junction which would eliminate a railroad from the route between applicants' lines. The Commission held it had no jurisdiction under § 1(18) because the connecting track was to be used only for switching service and was governed by the last sentence of § 1(18)[2] exempting from the Commission's authority contracts for the joint ownership or use of § 1(22) tracks (Appendix A, page 1a).

The moving of empty passenger equipment between a terminal station and applicant's coach yard on tracks of another railroad pursuant to a trackage rights agreement

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[2] Added to § 1(18) by sec. 4 of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 902, 49 U.S.C. § 1(18).

was characterized as "switching" in *St. Louis, S. F. & T. Ry. Co. Trackage Rights,* 267 I.C.C. 30, 36 (1946):

> "It seems clear that the use to be made by the applicant of the tracks of the Gulf Company is for a purely switching service within the Fort Worth terminal. Under such circumstances, and in view of the previous construction of the applicable provisions of the act, as shown above, it appears that we are not authorized to pass upon the question because such transactions are excluded from our jurisdiction."

The Commission accordingly dismissed the application for a § 1(18) certificate permitting operation over tracks of the Gulf Company.

Thus, to have been consistent with its declination of jurisdiction over connecting tracks used only for switching purposes, the Commission in this litigation, having recognized the operations over Republic Junction as "switching", should have refused to take jurisdiction over the connection and should have granted appellees' motion to dismiss their application (R. 28). The lower court's decision resolved the contradiction between the facts of record and the Commission's jurisdictional finding in a way, unlike the Commission's determination, wholly consistent with these Commission cases by holding that the connection, by the nature of the switching operations conducted thereover, was a § 1(22) switching track exempt from the Commission's § 1(18) jurisdiction.

3. Contrary To Appellant's View, No Settled Administrative Construction Supports the Commission's Jurisdiction Over the Connection.

The North Western argues on the authority of seven cases[3] (Appellant's Brief, pages 11-12) that consistent administrative interpretation by the Commission has settled the question of its § 1(18) jurisdiction over a connecting track. None of these decisions support appellant's contention because in none was the question of the Commission's jurisdiction raised by counsel or adjudicated by the Commission. The exercise of jurisdiction where it is not questioned or determined but has been passed *sub silentio* is not authoritative precedent. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 38 (1952); *Arant* v. *Lane,* 245 U.S. 166, 169-170 (1917). Because the proposition appellant seeks to support was not decided in those cases, they cannot be regarded as implications of an exercise of the Commission's authority assumed to be proper for a long period of time. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 307 (1962). If any established, consistent administrative determination of the Commission's power over a connection such as Republic Junction may be authoritative in the case at bar, it appears in the decisions cited at pages 13 and 14 hereof holding that tracks over which switching operations are conducted are outside the scope of the Commission's § 1(18) jurisdiction.

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[3] *Chicago, B. & Q. R. Co. Abandonment,* 267 I.C.C. 38 (1946); *Kansas City, M. & O. Ry. Co. of Texas Construction,* 224 I.C.C. 157 (1937); *Lucas County Farm Bureau* v. *Chicago, B. & Q. R. Co.,* 209 I.C.C. 489 (1935); *Charleston & W. C. Ry. Co. Construction,* 166 I.C.C. 707 (1930); *Construction By D., G. H. & M. Ry.,* 124 I.C.C. 338 (1927); *Operation By L. A. & S. L. R.R.,* 124 I.C.C. 207 (1927); *Construction By T., P. & W. R. R.,* 124 I.C.C. 278 (1927).

4. The Commission's § 1(18) Jurisdiction Over This Connection Would Authorize Its Jurisdiction Over Tracks Clearly Beyond Its Power To Permit or Forbid.

The fallacy of the Commission's contradictory decision that the connection is a § 1(18) extension based on its finding that movements over it are only switching operations is stressed by examples of trackage over which the Commission similarly could assume § 1(18) jurisdiction if Republic Junction is held to be a § 1(18) extension. Any "setting out" or parking of railroad cars on a sidetrack to be picked up later by another train could be characterized as "part of a through movement not incidental to a regular train movement" although the operations were conducted on a track in a railroad yard or picked up by a train of the same railroad for later interchange. Similarly, wherever cars should be picked up from a team track, moved to a railroad yard for classification and then transferred to another railroad which would carry them initially in a line haul movement, the Commission apparently would characterize the pick up and transfer operations as more than "incidental to a regular train movement." If the team track were connected, not to a main line track, but to a track in a classification yard, the Commission would so characterize the operation even though the regular train movement had not yet begun.

If the interchange switching over Republic Junction constitutes the connection an extension of a line of railroad within § 1(18), and not an exempt § 1(22) track, it follows that the Commission would have similar jurisdiction over a yard track to be used both for receiving cars delivered by another railroad and for storing loaded cars whose routing does not require interchange. Such tracks, however, are clearly within § 1(22) and beyond the Commission's power to permit or forbid.

Switching movements are essential to efficient, orderly railroad operations. Nevertheless, typical tracks on which switching occurs are incidental in comparison with, and by § 1(22) distinguishable from, the usually lengthy and expensive trackage required for line haul movements, trackage manifestly characteristic of the term "extension of a line of railroad" in § 1(18). A track on which cars are parked to be picked up by another train of the same railroad is a switching track by virtue of the switching operations conducted over it. Such a track acquires no different status if the cars are to be picked up by a different railroad.

B. The North Western and the Government Rely Principally Upon Two Inapposite Cases Which Cannot Support the Commission's Jurisdiction Over the Connection.

The North Western relies primarily on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), as authority for the Commission's assumption of § 1(18) jurisdiction over Republic Junction (Appellant's Brief, pages 10-16),[4] and the Government depends principally upon *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.* 270 U.S. 266 (1926). The facts deemed crucial by this Court in both of these cases are not analogous to Republic Junction, and the issues they decided are inapplicable to the issue decided by the lower court in the present litigation.

The *Alabama* decision held that the Commission's jurisdiction over the connection there in issue was necessary to assure the physical safety of interstate commerce; but the connection at Republic Junction poses no hazard to

[4] The Government also cites this decision at page 6 of its Memorandum, but the point it is intended to support is obscure.

traffic. This Court also confirmed the Commission's power, rather than a state's, to compel a junction between railroads; in the case at bar, however, the jurisdiction of the Commission to permit or forbid under § 1(18) of the Act, not its power to compel, was challenged. In the *Texas* case, the Commission's § 1(18) jurisdiction was rested on the fact the tracks there at bar invaded territory tributary to, and directly served by, another railroad. Republic Junction enables no such invasion. These basic facts conclusively distinguish these two decisions from the case at bar.

1. Alabama Ry. v. Jackson Ry. Is Not In Point.

The North Western argues that, since *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), held the Commission had exclusive jurisdiction over ". . . the establishment of junctions between the main lines of independent carriers. . .", 271 U.S. 250, the connection now before the Court is a § 1(18) extension of railroad line within the Commission's power to permit or forbid. This superficial "first blush" view of the *Alabama* case (Appellant's Brief, page 10) does not survive closer scrutiny.

The Commission also recognized the infirmity of this decision. Although the Recommended Report of the Commission's Examiner (R. 280-291) cites the *Alabama* case on this point (R. 286), the Report of the Interstate Commerce Commission (R. 292-314) avoids any reference to it.

The *Alabama* case stands for two propositions: (1) the Commission has jurisdiction over the construction of, or operations over, new railroad tracks if interstate commerce moving over them would physically be imperiled; and (2) the Commission's jurisdiction under § 3(4) and § 1(21) of the Interstate Commerce Act to compel the connection of one railroad with another over the objection of either or both is exclusive and precludes any such power of a state. Neither proposition is germane to this appeal.

a. In the Alabama Case the Commission's Jurisdiction Was Clear Because the Junction Imperiled Interstate Commerce, But No Such Element Is Present Here.

Alabama Ry. v. *Jackson Ry.*, 271 U.S. 244 (1926), turned on the fact that the connection sought by the Jackson and Eastern Railway would imperil interstate commerce. The Alabama successfully sued to enjoin eminent domain proceedings being prosecuted by the Jackson to condemn a junction at Curran's Crossing with the main line of the Alabama. The Supreme Court of Mississippi reversed, twice holding that the connection could be condemned at a safe place. 131 Miss. 857, 95 So. 733 (1922); 136 Miss. 726, 101 So. 553 (1924). This Court reversed on certiorari, deciding that if the Alabama's objections were well-founded, a junction where desired by the Jackson would obviously imperil interstate commerce and "The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, . . ." 271 U. S. 250.

Since the *Alabama* decision other cases similarly have held the Commission has exclusive jurisdiction over new tracks when operations thereover would interfere with interstate commerce. *Missouri Pac. R. Co.* v. *Chicago, R.I. & P. Ry. Co.*, 41 F. 2d 188 (C.A. 8, 1930), a suit under § 1(20) of the Act, which was enacted in sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(20), (Appendix A, pages 1a-2a), to enjoin construction without a certificate, decided that a proposed 3,700 foot track crossing the main line of the Rock Island to reach a new freight station was an extension on the ground, *inter*

alia,[5] that it would interfere with main line traffic on the Rock Island. *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C. A. 8, 1925), a similar § 1(20) action, concerned a 1,500 foot connection between the El Dorado and Missouri Pacific crossing the right of way and four tracks of the Rock Island which was held to be within the Commission's jurisdiction because it would interfere with the Rock Island's use of its track and terminal.

In *Re Quality Limestone Products, Inc.*, 41 Wis. Pub. Serv. Comm. 534, 536, 16 P.U.R.3d 205 (1956), cited by the North Western (Appellant's Brief, p. 13), the state commission held because a connection would be partially on a 2% to 3% grade and connect with a main line by a facing-point switch rather than a trailing-point switch,[6] that the safety of railroad operation was at issue and that the construction of the connection was within the Commission's jurisdiction to compel.

The record contains no evidence, and the Commission did not find, that the operations over Republic Junction are

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[5] The decision also held the new track was an extension under the rule of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), discussed herein at page 29 *et seq.* Safety of interstate commerce is not irrelevant because it was only one of several grounds for this decision. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Massachusetts* v. *United States*, 333 U.S. 611, 622-623 (1948).

[6] A junction with a main line at an obtuse angle in the direction from which main line trains approach requires a "facing-point" switch which, if aligned for the diverging route, would derail a train approaching at main line speed when it attempts to negotiate the sharp curvature of the switch. If such angle is acute, however, the switch is a "trailing-point" which, even if set for the diverging route, permits a train to move through it at speed, forcing the movable switch-points into alignment with the main line as the train passes.

dangerous to or jeopardize interstate commerce on either the Ishpeming or Milwaukee. The safety element and the interference factor which impelled the decisions in these cases are wholly absent from Republic Junction. The *Alabama* case and the others, consequently, are entirely inapposite to the case at bar.

b. The Commission's Authority Recognized In the Alabama Case Was to Compel Track Construction, Not to Permit or Forbid Voluntary Construction Like Republic Junction.

The question before the Court in *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), was not whether the connection there involved was one requiring a certificate of public convenience and necessity under § 1(18), but whether the connection could be compelled over the objections of the Alabama by eminent domain proceedings in a state court. Counsel for the Jackson asserted, as stated in the summary of argument before the Supreme Court of Mississippi at 131 Miss. 859, not set out in 95 So., that the Commission's power over railroad junctions is a power ". . . to determine the right of one railroad by compulsory proceedings to unite its track with the track of another railroad." The decision of this Court stated, at 271 U. S. 250:

> "The Commission's power under paragraph 3 of § 3 to require the establishment of connections between the main lines of carriers was asserted by it . . ."

Both this Court and the state court referred to the jurisdiction of the Interstate Commerce Commission to establish or require a connection, and it is this power, not the § 1(18) power to permit, which this Court held had been

exclusively conferred upon the Interstate Commerce Commission.

The Mississippi court so understood this Court's decision, and on motion for final judgment, 144 Miss. 702, 703, 110 So. 865 (1926), held that because the approval of the Interstate Commerce Commission had not yet been obtained ". . . the connection could not lawfully be coerced by the state court . . ." and made the injunction perpetual ". . . until such connection is ordered by the Interstate Commerce Commission."

The North Western infers far too much from the *Alabama* case. It is authority for the Commission's jurisdiction only over tracks which could not be built unless a reluctant railroad were compelled to accede to the desires of the proponent of the new trackage. No such coercion is needed when, as in the instant proceeding, the connection has been voluntary. Such a power over Republic Junction could compel only what already had been done by the Ishpeming and Milwaukee.

(1) The Power to Coerce Track Construction Asserted in the Alabama Case Derives From § 3(4) and § 1(21), Not From § 1(18) Which Governs Republic Junction.

The Commission's authority to compel railroads to connect with each other is delegated by § 1(21) or by the present § 3(4), formerly § 3(3), of the Interstate Commerce Act. *Interstate Commerce Comm.* v. *Los Angeles*, 280 U.S. 52, 64, 67 (1929). Both *Pittsburg & West Virginia Ry. Co.* v. *L. E., A. & W. R.R.*, 81 I.C.C. 333 (1923), and *Breckenridge Chamber Commerce* v. *W. F., R. & F. W. R.R. Co.*, 109 I.C.C. 81 (1926), dismissed complaints requesting the Commission to require connections between two railroads. Although its jurisdiction was

questioned in neither case, the Commission asserted its power to compel such tracks under the then § 3(3) of the Act, sec. 405 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 479, since renumbered § 3(4) by sec. 5(e) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 903, 49 U.S.C. § 3(4), (Appendix A, p. 3a).

The issue of the Commission's power to compel an interchange connection under § 3(3) of the Act was squarely raised in *Keyes Ry. Committee* v. *Beaver, M. & E. R. Co.*, 214 I.C.C. 526 (1936). In that case the committee desired a 365 foot connection between the tracks of two railroad systems at a point where their right of way adjoined. One railroad opposed the track and questioned the jurisdiction of the Commission to compel it under the then § 3(3). The Commission cited the *Alabama* case and held at 214 I.C.C. 527:

> "However, a switch connection between such systems, or between their subsidiaries, has been deemed a proper and reasonable facility for the interchange of traffic within the meaning of section 3(3), and it is within our power to order into effect such a connection where public convenience and necessity justify and require it."

The Commission's § 1(21) power supplements its § 3(4) authority. In *Los Angeles Passenger Terminal Cases*, 142 I.C.C. 489, 496-497 (1928), the Commission cited the *Pittsburg* and *Breckenridge* cases and *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), in support of its § 3(3) power to require establishment of a switch connection. A concurring opinion of Commissioner Eastman declared at 142 I.C.C. 499 that § 1(21) gave the Commission ample power to compel such a track and that such power stems both from § 3(3) and § 1(21). *City of Milwaukee* v. *Chicago*

& N.W. Ry. Co., 283 I.C.C. 311 (1951), confirmed Eastman's view by compelling under § 1(21) construction of a crossover track from a line of one railroad across the tracks of another to connect with the trackage of a harbor facility.

(2) The Commission's Power to Compel Is Not Coextensive With Its Power To Permit But Is Limited In Scope Compared To Its § 1(18) Powers.

The North Western's reliance on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), implies, although no attempt is made to show, that the Commission's power to compel under § 3(4) and § 1(21) is coextensive with its power to permit or forbid under § 1(18). Unless the scope of such power is the same under both, the two provisions cannot be construed to cover precisely the same kinds of railroad tracks, and § 1(22) cannot apply to § 1(21) with the same effect it applies to § 1(18).

This Court had occasion to contrast and compare § 1(21) with § 1(18) in *Interstate Commerce Comm.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 (1933), which denied the Commission's power to require a railroad under § 1(21), to construct a 185 mile extension of line through a sparsely settled area across 20 miles of swamp, 15 miles of alkali flats and 115 miles of desert at an estimated cost of about $10,000,000. Against a contention that the Commission's power to compel was unlimited, 288 U.S. 35, this Court observed that the legislative intent underlying § 1(18) was that in extending its existing facilities the free exercise of a railroad's discretion could not be permitted to drain its resources to the detriment of the public, while, on the other hand, § 1(21) refers primarily to car

service facilities and to extension of line only in amplification thereof. At 288 U.S. 37, the decision states:

> "The same principles and the same needs might equally require the building of a new line as the extension of an existing one, unless, indeed, Congress recognized a radical difference between compelling embarkation in a new venture and ordering a mere extension of facilities required as the natural concomitant and complement of those presently used for the rendition of the service to which the carrier has committed itself."

Expensive relocation of tracks incidental to establishment of a new union station can not be required by a state commission, but only by the Interstate Commerce Commission. *Railroad Commission* v. *Southern Pac. Co.*, 264 U.S. 331 (1924). In a subsequent appeal, *Interstate Commerce Comm.* v. *Los Angeles*, 280 U.S. 52, 67, 70 (1929), the Court held that the Commission's power under § 3(4) and § 1(21) to compel construction of connecting tracks and provide car-service facilities was limited to those requiring no unreasonable expense.

Section 1(10) of the Interstate Commerce Act, as amended and re-enacted by sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 476, 49 U.S.C. § 1(10), provides that "car service" includes ". . . the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars . . ." The exchange and interchange of cars between railroads must be via trackage connecting their lines; and the Commission's exclusive jurisdiction over car supply must include the power to compel such connections as a practical concomitant of its duty to insure an adequate car supply.

Because a § 1(18) extension of a railroad line is something more than a § 1(21) connection or car-service facility,

§ 1(21) does not in any way circumscribe § 1(22) in its relation to § 1(18). If a track is within § 1(22), the Commission's power under § 1(21) does not make it a § 1(18) extension. Because the *Alabama* case was a compulsion case, it confirmed the Commission's § 1(21) power but did not adjudicate the Commission's § 1(18) jurisdiction. Since this litigation concerns the Commission's power only under § 1(18), the *Alabama* decision is irrelevant.

(3) Appellant's Cases Justifying the Commission's Power to Compel Similarly Are Not In Point.

The North Western cites other decisions purporting to be authority for reversal of the lower court but which are subject to the same infirmity as *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926). *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N.W. 809 (1926), was a suit to compel the Great Northern and Milwaukee to construct an interchange connection between their lines which both railroads opposed. The state commission ordered the connection built over the Milwaukee's objection to its jurisdiction, and on appeal the state supreme court initially affirmed on the ground the state could compel the connection.

The *Pipestone* case was decided only a month before this Court decided the *Alabama* case, and on reargument, 167 Minn. 177, 213 N.W. 534 (1926), the Minnesota court set aside its previous opinion and held *Alabama* controlled and that the Interstate Commerce Commission had exclusive jurisdiction to compel connections between carriers unwilling to connect voluntarily.

In *Lucas County Farm Bureau* v. *Chicago, B. & Q. R. Co.*, 209 I.C.C. 489 (1935), the Bureau invoked the Commission's power to require the Burlington and Rock Island

railroads to connect their lines. The Commission dismissed the complaint, and the railroads were not required to build it. *Board of Administration* v. *Chicago, B. & Q. R. Co.*, 138 Kan. 720, 27 P.2d 550 (1933), concerned a petition to a state commission to require the Burlington and Rock Island to construct an interchange connection which the commission ordered built. On appeal the state trial court voided the order for lack of the commission's jurisdiction, and the state supreme court affirmed on the ground jurisdiction to compel such a connection was vested exclusively in the Interstate Commerce Commission.

Like *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), each of these three cases adjudicated only that the Commission had exclusive power to compel § 1(21) construction. They are similarly inapplicable to this § 1(18) litigation. Section 1(18) grants the Commission authority only to permit or forbid construction of railroad tracks on an application willingly prosecuted by the carrier or carriers undertaking the project voluntarily. *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, 273 (1926); *Powell* v. *United States*, 300 U.S. 276, 287 (1937). The Commission's § 1(18) power thus is no different than, for example, its power over railroad mergers, which it can permit if voluntary on the part of the railroads involved, but which it cannot initiate or coerce. *St. Joe Paper Co.* v. *Atl. Coast Line R. Co.*, 347 U.S. 298 (1954).

2. Contrary to the Commission's Report, the Lower Court Correctly Held the "Invasion" Doctrine of the Texas Case Did Not Make This Connection an Extension Within the Commission's Jurisdiction.

The Commission's Report (R. 296-298) and the Memorandum of the Government herein base their argument for the Commission's jurisdiction over Republic Junction

principally on *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), despite the inherent incompatibility of that case with this. Recognizing the limits of the "invasion" doctrine, the lower court held the *Texas* case could not apply to this connecting track because neither the Milwaukee nor the Ishpeming thereby were enabled to "invade" new territory or territory served by another railroad (R. 391, 392).

a. The Tracks In the Texas Case Were Extensive Enough To Be an Extension, But the Republic Junction Connection Is Not.

In the *Texas* case the Texas and Pacific Railway applied for an injunction under § 1(20) of the Interstate Commerce Act alleging that the Gulf, Colorado and Santa Fe Railway proposed to construct a 7.5 mile extension of line into an industrial area adjacent and naturally tributary to the Texas without first obtaining a § 1(18) certificate of public convenience and necessity. The Gulf denied the track was an extension of its line and declared it to be a § 1(22) industrial track exempt from the requirements of § 1(18) and the Commission's jurisdiction. *Lancaster* v. *Gulf, C. & S. F. Ry. Co.*, 298 Fed. 488 (S.D. Tex., 1924). The Texas had served industries in the area for many years while the Gulf had not. The project was to cost $510,000 for, not one track, but several: a "Y", four side tracks and five spur tracks in addition to the 7½ mile lead track. The district court held this elaborate complex of trackage was an extension.

On its facts alone, therefore, the *Texas* case is inapplicable to the 262 foot connection at Republic Junction which cost only $28,000 (R. 101, 385) and compromises a single track completely within appellees' adjoining rights

of way (R. 99, 385). The Commission's failure thus to compare the facts of the *Texas* case with those before it in this led to its erroneous reliance on the *Texas* case to support its alleged § 1(18) jurisdiction over this connection.

b. The Texas Case "Invasion Doctrine" Has Been Applied Only In the Presence of Factors Absent From Republic Junction.

On appeal, 4 F.2d 904 (C.A. 5, 1925), the court reversed the district court on the ground the proposed trackage came within the common meaning of "industrial tracks" on the authority of several decisions antedating the Transportation Act of 1920. This Court on writ of error reversed and held § 1(22) did not apply because the extensive new trackage would "invade" territory already served by the Texas and Pacific, which, as a result, would lose annual revenues of some $500,000 by diversion of traffic from it to the Gulf. The Court recognized that typically § 1(22) tracks are ordinarily inexpensive and are intended either to improve facilities required by shippers already served or to provide the same facilities to others and that the necessity for such tracks depends on local conditions within the prerogative of the states to regulate. Through Mr. Justice Brandeis the Court compared such tracks with the proposed trackage of the Gulf and held at 270 U.S. 278:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier; its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to

> secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

The effect of this decision was to require the Gulf to obtain a § 1(18) certificate from the Interstate Commerce Commission before proceeding with the project.

The invasion doctrine thus pronounced expressly indicates its own limitation in the quoted words of the Court. The invasion must be "substantial" as was the complicated and expensive undertaking in the *Texas* case. The trackage itself must reach into territory not previously served by the railroad constructing it, and the territory must already be served adequately by another carrier whose traffic thereby will be diverted to a considerable extent. A new or proposed track which, absent these characteristics might be exempt under § 1(22), by virtue of them becomes a § 1(18) extension under the *Texas* case.

Ten cases since the *Texas* case in which new tracks construction was alleged to be an "extension of railroad line" requiring a § 1(18) certificate because it invaded another carrier's territory, have held the new construction involved to be an extension within the Commission's § 1(18)

jurisdiction to permit or forbid on such ground.[7] In each of these, as in the *Texas* case, the determinative facts were that substantial new construction would itself physically reach into an area previously served by another carrier and, by providing service to shippers therein who had not previously been served by the invading carrier, divert traffic and revenue from the other railroads.

In contrast to the *Texas* case and the lower court decisions cited above holding that "invasion" makes a track a § 1(18) extension which otherwise would be within § 1(22), the lower courts uniformly have declined to find an "invasion" whenever it was shown that the trackage lacked the essential elements of the *Texas* case. Thus there was no invasion which would remove a proposed track from the exception of § 1(22) where the constructing railroad already had been holding itself out to serve the area allegedly invaded. *Detroit & Toledo Shore L. R. Co.* v. *New York Cent. R. Co.*, 233 F.2d 168 (C.A. 6, 1956); *Chicago, M., St. P. & P. R. Co.* v. *Chicago & E. I.*

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[7] *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F.2d 854 (C.A. 10, 1952); *Missouri Pac. R. Co.* v. *St. Louis Southwestern Ry. Co.*, 73 F.2d 21 (C.A. 8, 1934); *Missouri Pac. R. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 41 F.2d 188 (C.A. 8, 1930), certiorari denied, 282 U.S. 866; *New York Central R. Co.* v. *Norfolk & Western Ry. Co.*, 214 F. Supp. 549 (S.D.W.Va., 1963); *Chicago, Rock Island & Pac. R. Co.* v. *Chicago & N. W. Ry. Co.*, 188 F.Supp. 549 (S.D. Ill., 1960); *State of Georgia* v. *United States*, 156 F.Supp. 711 (N.D. Ga., 1957), affirmed *per curiam*, 356 U.S. 273 (1958); *Chicago, Rock Island & Pacific R. Co.* v. *Thompson*, 135 F.Supp. 43 (E.D. Ark., 1955); *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F.Supp. 710 (W.D. Wash., 1954), affirmed *per curiam*, 225 F.2d 840 (C.A. 9, 1955); *Pennsylvania R. Co.* v. *United States*, 40 F.2d 921 (W.D. Pa., 1930); *Chicago, R. I. & P. R. R. Co.* v. *Commerce Com.*, 414 Ill. 134, 111 N.E. 2d 136 (1953).

R. Co., 198 F.2d 8 (C.A. 7, 1952); *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F. Supp. 616 (E.D. Pa., 1955), affirmed *per curiam*, 226 F.2d 958 (C.A. 3, 1955); *Chicago Great Western Ry. Co.* v. *Jesse*, 249 Minn. 324, 82 N.W.2d 227 (1957). One cannot "invade" his own territory.

Similarly no invasion was recognized where the railroad alleging invasion was in no position to serve the area into which the new track would extend. *New York Central R. Co.* v. *Chicago & Eastern Ill. R. Co.*, 222 F.2d 828 (C.A. 7, 1955). One is not "invaded" unless the invader goes into his territory. Nor is there an "invasion" if the track would enable the constructing carrier to serve no additional or new shippers. *Missouri Pac. R. Co.* v. *Union Pac. Ry. Co.*, 60 F.2d 126 (D.Kan., 1931); *Missouri Pac. Rld. Co.* v. *Chicago Great Western Rld. Co.*, 137 Kan. 217, 19 P. 2d 484 (1933).

Unless a railroad's service to a particular shipper has become an established pattern, another railroad's construction of track to serve the shipper is not an invasion within the *Texas* doctrine, even though both railroads already compete for traffic from the general area. In *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768 (C.A. 5, 1949), the court held the new construction was a § 1(22) track because it tapped a source of traffic wholly new, not only to the constructing road, but to all railroads.

We commend these decisions to the Court as well-reasoned, practical expressions of the logical bounds of the invasion doctrine.

c. No "Invasion" Under the Texas Case Occurs at Republic Junction Because the Requisite Factors Are Absent.

The facts surrounding the Republic Junction connection distinguish it from the trackage before this Court in the *Texas* case and confirm that the Commission misapplied the invasion doctrine as the basis for assuming § 1(18) jurisdiction over it. The lower court perceived what the Commission failed to recognize in its Report, and what the Government still refuses to acknowledge: none of the considerations underlying the *Texas* decision pertain to the connection now before the Court.

A track 262 feet in length is hardly a substantial amount of trackage in terms of the *Texas* case, and an expenditure of $28,690 to construct such a short connection and two sidetracks is not substantial. Compared to the $510,000 cost of the Gulf's proposed trackage, it is no more than trivial.

Built entirely within the confines of appellees' adjoining rights of way (R. 99), the connection itself cannot "invade" any territory of another railroad. The nearest trackage of the Soo Line or North Western to Republic Junction are 6 and 9 miles, respectively, away, as is shown on the plat (Applicants' Ex. 2; R. 226, 114). Neither the Soo Line nor the North Western, of course, could serve the area adjacent to the connection.

No industries are naturally tributary to either the connecting track or the sidetracks, and the new trackage cannot itself provide railroad service to any shipper not served by the Milwaukee or Ishpeming prior to its construction or who would not be served by them in the absence of the connection.

Not a single essential element of the *Texas* case is present in this case on which the invasion doctrine can be

predicated. In contrast, each and every factor upon which lower courts have declined to apply that doctrine is characteristic of the new tracks here at issue. The invasion doctrine is manifestly irrelevant to this litigation.

d. Nor Does the Connection Cause "Invasion" Elsewhere Than at Republic Junction Because the Necessary Elements Are Similarly Not Present.

The Commission and United States, in their Memorandum, transgress these fundamental and determinative considerations. They reject the clear implication of the *Texas* case that "invasion" occurs only when the new tracks themselves physically extend into the allegedly invaded territory and argue that construction of the connection enabled an "invasion" miles away from Republic Junction. Any such effect is wholly illusory.

"Invasion" under the *Texas* case must be grounded upon the actual intrusion of ballast, ties and rail into new territory. These constitute "trackage", and in the *Texas* decision this Court specified: ". . . where the proposed trackage extends into territory. . ." *Texas & Pac. Ry.* v. *Gulf, Etc. Ry.*, 270 U.S. 266, 278 (1926). The Commission and Government thus neglect the plain meaning of the words by which this Court formulated the very doctrine here urged as reason for reversing the lower court. Not a single instance is suggested, and we know of none, where "invasion" was based upon other than such a physical intrusion of newly laid steel rail.

The Government's argument is not aided by avoiding the prerequisite of physical intrusion. Neither the Milwaukee nor the Ishpeming now serve any territory not served by them prior to the connection or which would not be served by them in the absence of the conection (R. 101). The Ishpeming obtained authority to serve Sunrise

Landing before the connecting track was constructed (R. 301); the Milwaukee has long served Amasa and Iron Mountain (R. 300, 301, 390) as the Commission admits (R. 400). No additional service to these points was initiated by means of the connecting track. The tracks being there in place, the Ishpeming and Milwaukee would continue to serve these stations as well without the connection as with it. They entered no new territory on account of it (R. 101, 391).

Nor did the connection enable its builders to provide new service to a single new shipper. No new spur, team or industrial tracks were constructed near or about the connection to initiate traffic which would not have moved on appellees' lines if the connection had never been built. The Milwaukee and Ishpeming were not by the new tracks enabled to provide service in any territory or to any shipper theretofore served by the Soo Line or North Western because neither of those railroads ever served Sunrise Landing (R. 301, 390-391).

The Milwaukee and North Western compete with each other for traffic originating on the Ishpeming (R. 301). The North Western obtains such traffic from the Ishpeming at Little Lake, Michigan (R. 301); the Milwaukee obtains it now at Republic Junction and formerly from the present Soo Line at Champion (R. 301, 389). This by no means is the sort of competition to which the doctrine of the *Texas* case applies. Where two railroads already compete with each other for traffic from a territory, one of them does not invade by building a new track into the area which, in such event, neither road has an exclusive right to serve. *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768, 770 (C.A. 5, 1949).

If, as contended by the North Western, it has lost traffic by reason of the connecting tracks, such loss was caused by improvement of the service and interchange facilities of the Ishpeming and Milwaukee, not by the invasion of any territory of either the Soo Line or North Western.

We have not claimed, because it seems to us unnecessary, that the jurisdiction of the Commission over Republic Junction was negated by more than the § 1(22) exemption. But even in the absence of that exemption, it is obviously doubtful the connection constitutes an "extension of lines" of either the Milwaukee or the Ishpeming within the meaning of § 1(18), since it enables neither the Milwaukee nor the Ishpeming to reach a single additional shipper or receiver of freight, nor is either railroad enabled to transport freight to or from any origin or destination which could not have been reached by them prior to the establishment of the connecting track.

C. Republic Junction Creates No Unlawful Competition With Appellant or Other Railroads.

The crux of the arguments of both the North Western and the Government is that the competitive effect on the North Western and Soo Line created by new through routes via Republic Junction from Ishpeming origins to destinations on the Milwaukee and its connections make Republic Junction an "extension of line." The argument is untenable.

1. No Trackage Rights Beyond the Connection Justify the Commission's Jurisdiction, and Trackage Rights Cases Cited by Appellant Are Irrelevant.

A railroad by contract may run its trains over the tracks of another railroad in lieu of using its own tracks or of building a new track. Such an arrangement may be an

extension of line requiring a § 1(18) certificate the same as if the carrier instead of utilizing trackage rights were to extend its own tracks. *Transit Commission* v. *U. S.*, 289 U.S. 121 (1933).

The contract between the Milwaukee and Ishpeming for the construction and operation of the connection does not contemplate any such arrangement (Applicants Ex. 4; R. 230-238, 114). The supplemental application made by them under § 5(2) of the Act to permit the use of the Ishpeming's main line by the Milwaukee locomotive returning to its own tracks after delivery of cars to the Ishpeming (R. 68-93) was properly dismissed by the Commission as unnecessary in view of the § 1(18) application (R. 291, 315). Such use is merely incidental to the interchange operation over the connection, and the statement of the North Western concerning "joint use of the involved tracks" (Appellant's Brief, page 16) can make it nothing more.

Although a connection between two railroads often is a prerequisite to the use of trackage rights, *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F. 2d 777 (C.A. 8, 1925), and, in such event, is within § 1(18) the same as the trackage rights thereby made possible, *Chicago, B. & Q. R. Co. Abandonment*, 261 I.C.C. 549, 267 I.C.C. 38 (1946), a connection may also be used only for interchange purposes as is Republic Junction. By citing trackage rights decisions in its Report (R. 299), the Commission overlooked the fact that its § 1(18) jurisdiction in such cases is based on the extension of a line of railroad to a new destination by running trains over the other railroad. This is the reason for the lower court's statement (R. 390) that cases involving trackage rights are not in point with the present litigation.

The North Western's reliance on *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244 (1926), is misplaced for the same reason,[8] and the North Western bases its criticism of the lower court's analysis of the *Alabama* case on its own erroneous statement of that case (Appellant's Brief, page 16).

On the first appeal of the case to the Mississippi Supreme Court, 131 Miss. 857, 868, 95 So. 733, 735 (1922), the decision stated:

> "It is further charged that, upon information and belief, the objects and purposes of the defendant in beginning the said eminent domain proceedings were not only to effect a junction of its road with the complainant's road, but designs and purposes to run its trains, locomotives, and cars over the main line of the complainant, . . . from the junction point to the city of Jackson . . ."

The Jackson and Eastern already had obtained a § 1(18) certificate authorizing its construction of an extension of its railroad to Jackson, *Public-Convenience Certificate to Jackson & Eastern Ry.*, 70 I.C.C. 110 (1921), but it intended to build its own tracks only to the place of connection with the Alabama because it was financially unable to build further. 136 Miss. 726, 740, 101 So. 553, 556. The President of the Jackson and Eastern testified that he expected his railroad to get to Jackson by obtaining the right to use the Alabama's tracks to that city. 136 Miss. at 738, 101 So. at 555.

El Dorado & W. Ry. Co. v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C.A. 8, 1925), also is not in point here because the extension of line it proscribed was to be accomplished

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[8] This case is also not in point here for the other reasons discussed herein at pages 19-28.

by utilizing trackage rights over another railroad for the through movement of trains. In both of these cases, unlike the operations over Republic Junction, trains were not to be broken apart at the connection, and interchange cars were not to be placed on a separate track. Over the instant connection there is no through train movement over another's line and not the remotest suggestion in the Record that the Republic Junction connection is, as the *Alabama* decision states at 271 U.S. 250, ". . . but a step toward the joint use of tracks."

Because no extension by means of trackage rights is involved in this litigation, the North Western's citation of trackage rights cases to support the Commission's § 1(18) jurisdiction over Republic Junction is not in point. In *Chicago, B. & Q. R. Co. Abandonment*, 267 I.C.C. 38, 38 (1946), the Commission had previously, 261 I.C.C. 549, issued § 1(18) permission to construct a connection ". . . for the purpose of facilitating the proposed operation under trackage rights . . ." over another railroad so that 53.15 miles of applicant's own line might be abandoned.

The proposal in *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 (1930), was to construct a two mile connecting track to supplant an interchange arrangement between two railroads via trackage rights over 1,000 feet of tracks belonging to a third road. We find no support in the Commission's Report in that case for the North Western's statement (Appellant's Brief, page 12) that a motion to dismiss the application was made, although the Commission observed at 166 I.C.C. 708 that some doubt had been expressed as to its jurisdiction. The Commission's § 1(18) jurisdiction was proper, however, because the arrangement would cost an excessive $600,000 and contemplated a 750-foot tunnel and rights of way across inter-

vening lands as well as the relocation of certain tracks of the carriers to be connected. No objection to the application was made, and the certificate issued.

Construction By D., G. H. & M. Ry., 124 I.C.C. 338 (1927), is similarly not in point because the 2.48 mile connecting line was to be used for through freight movements.

2. The Government Erroneously Equates "Through Routes" With "Extensions of a Railroad" to Justify the Commission's Jurisdiction Over Republic Junction.

The United States and the Commission argue to this Court, as they did in the court below, that the Republic Junction connection is within the holding of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), on the ground that new through routes made possible by the connection constitute the means of invasion. The establishment of new through routes, however, is not an extension of a line of railroad.

A through route is an arrangement between railroads for continuous joint transportation of freight from an origin on the line of one to a destination on the line of the other. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136, 139 (1917). The only condition precedent and only requirement under the Act for establishing a through route is the publication of an applicable rate in a tariff, constituting a holding out of the two carriers to provide the through transportation service. *Thompson* v. *United States*, 343 U.S. 549, 557 (1952). Although the Commission may compel establishment of through routes under § 15(3) of the Interstate Commerce Act (Appendix A, page 4a), subject to the limitations stated in § 15(4) of the Act (Appendix A, page 4a), Commission approval of their creation is unnecessary, and the Commission has no statu-

tory duty or power to police their institution by the voluntary undertaking of the parties thereto. *Denver & R. G. W. R. Co.* v. *Union P. R., Co.*, 351 U.S. 321, 327 (1956). Simply the movement of cars via the through route is sufficient to establish it. *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 563-564 (1952).

The Commission in this litigation would attempt to bring the voluntary creation of through routes within its power to permit or forbid under § 1(18) whenever any new track is required in order to create such route. Thus, by the Commission's reasoning, a new through route for the benefit of a shipper already served by the Milwaukee or Ishpeming would require the Commission's § 1(18) approval, even if it required the construction of only a short industrial spur to the shipper's plant. Such a track is manifestly a § 1(22) track over which the Commission otherwise would have no jurisdiction.

The Commission thus would enlarge its authority over through routes beyond that contemplated by either § 1(18) or § 15. This an administrative agency may not do. *Civil Aero. Bd.* v. *Delta Air Lines*, 367 U.S. 316 (1961); *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956).

The "invasion" ascribed to the Ishpeming and Milwaukee by the Government must exist under the *Texas* case quite apart from the presence or absence of new through routes made possible by the connection. Such an invasion does not exist, and through routes alone are not sufficient upon which to predicate a violation of § 1(18). Together, as the Commission puts them, they could only result in a confusion of § 15 with §§ 1(18)-(22) contrary to the intent of Congress in enacting those provisions as different sections of the Act.

3. Appellees' Improvement of Transportation Service Is Not An "Extension of Line" and Not Unlawful Because The Resulting Competition Attracts Traffic.

The Commission's conclusion that Republic Junction enabled the Ishpeming and Milwaukee to compete for new traffic (R. 298), and the implication that without the connection they could not do so, is an unwarranted confusion of "extension of a line of railroad" with an improvement in transportation service. The Commission's assumption was that increased competition made possible by the connection is unlawful because of the provisions of § 1(18) of the Act, and on this appeal the North Western and the Government join in advocating that view. They are mistaken; nothing is inherently unlawful in competing more successfully for traffic.

Sections 1(18) through 1(22) of the Interstate Commerce Act do not proscribe better and more efficient transportation service brought about by the improvement of transportation facilities merely because such improvement enables carriers to attract traffic from other railroads. These provisions of the Act concern only construction or abandonment of railroad tracks and, if within the ambit of § 1(22), they are exempt therefrom unless they "invade" another's territory under the doctrine of the *Texas* case even though they make competition among railroads keener.

Long Island Rail Road Co. v. *Deleware, L. & W. R. Co.*, 183 F. Supp. 319 (E.D. N.Y., 1960), emphasized the distinction between an extension of a "line of railroad" and of transportation service, and at page 324 the court stated:

> "What a railroad *does* is to carry or transport; the definition of transportation described the instrumentalities so employed; . . .

> "The interdiction of § 1(18) is directed to the expansion of a railroad, not to developments concerning the methods whereby the transportation function is performed arising from competition in that field."

The Commission adopted this distinction in *Absorption of Drayage and Trucking Charges,* 197 I.C.C. 675, 679-680 (1933), and held in *Arlington & F. A. R. Co., Extension of Operation,* 228 I.C.C. 479, 481-482 (1938), that "extension" under § 1(18) means an extension of the railroad itself, not of its appurtenant services.

In *Great Northern Ry. Co. Construction,* 166 I.C.C. 3 (1930), the Commission issued a § 1(18) certificate permitting construction of a 36-mile branch line. In a suit to set aside the order the plaintiff alleged that part of its railroad line would become useless because of the competition from the proposed branch. The three-judge court stated, in *Indian Valley R. R.* v. *United States,* 52 F. 2d 485, 487 (N.D. Cal., 1931), that the only loss would be a loss of traffic revenue due to a competing line and held that the right to be free from competition was only a privilege to be enjoyed so long as it existed; it was not an enforceable legal right.

Competition is not a factor in assessing whether the connection is within the Commission's § 1(18) jurisdiction or, under § 1(22), exempt from it.

Competition among railroads is not forbidden, and the fact that a carrier may suffer diversion of traffic as a consequence does not make it unlawful, even if such carrier be a small railroad in the Upper Penninsula of Michigan. *Escanaba & L. S. R. Co.* v. *U.S.,* 303 U.S. 315, 322-323 (1938). Apart from its bearing on the issue of public convenience and necessity raised by the § 1(18) applica-

tion (R. 24), economic injury from keener competition is not a factor to be weighed in this proceeding. *Commission* v. *Sanders Radio Station*, 309 U.S. 470, 473 (1940). The inquiry before the lower court was whether the connection is an extension or a § 1(22) track, and this does not encompass any question of economic injury.

Enlargement of appellee's transportation services by the Republic Junction connection, making more effective their competition for traffic which otherwise they could not transport, is wholly irrelevant and immaterial to whether the connection is, or is not, an "extension" of railroad line. Improvement of service cannot be equated with a § 1(18) extension of line of railroad.

II.

The Decision Below, Exempting Republic Junction From § 1(18) of the Interstate Commerce Act and the Commission's Jurisdiction Thereunder, Was a Proper Exercise of the Court's Function On Review to Construe § 1(18) and § 1(22) of the Act and Apply Them To the Jurisdictional Facts Found By The Commission.

We have considered it beyond serious doubt that, on review of an agency order assailed for exceeding the scope of the agency's delegated power, a court could inquire whether the agency had assumed jurisdiction in accordance with the pertinent statutes. The North Western, however, declares such an inquiry is not permissable because controlling weight must be accorded the Commission's finding as to its own jurisdiction. Describing the proceedings below as *de novo*, appellant argues the Commission's finding that it had § 1(18) jurisdiction over the connection was a factual finding within the sacrosanct realm of the Commission's expertise.

A. There Are No Grounds For Appellant's Assertions That The Proceeding Below Was De Novo.

The North Western contends the three-judge district court below tried and decided *de novo* the question whether the Republic Junction connection was an extension subject to the requirements of § 1(18) or a § 1(22) track exempt from the Commission's jurisdiction under that section. Throughout its Jurisdictional Statement and Brief appellant repeatedly refers to *de novo* proceedings, and the main thrust of its argument (Appellant's Brief, pages 17-31) is that such a *de novo* determination is improper in this case.

The term *"de novo"* means the complete disregard of any prior adjudication and a new determination as if there had been no previous litigation. *Pittsburgh S. S. Co.* v. *Brown,* 171 F. 2d 175 (C.A. 7, 1948); *American Fruit Growers* v. *S. T. Runzo & Co.,* 95 F. Supp. 842, 844 (W. D. Pa., 1951). In a *de novo* proceeding the evidence is heard and the facts found on which a new determination is made. *Crowell* v. *Benson,* 285 U.S. 22 (1932); *Spano* v. *Western Fruit Growers,* 83 F. 2d 150, 152 (C.A. 10, 1936). The district court did not conduct such a proceeding or make such a determination.

The opinion of the lower court lacks any implication whatever that its adjudication was *de novo* (R. 384-393). This phrase, so abundantly repeated in appellant's brief, is conspicuously absent from this opinion and from the decree entered pursuant thereto on June 18, 1963 (R. 393-396). The lower court heard no new evidence in the course of the proceedings before it, but tried the case on the record made before the Commission.

The complaint in this cause (R. 1-13) in paragraph one (R. 1-2) states the purpose of the lower court suit was

"to annul and set aside, and to enjoin the enforcement of" the orders of the Interstate Commerce Commission in the two Finance Dockets. Paragraph two (R. 2) alleges that jurisdiction of the action is conferred on the lower court by Title 28 U.S.C. § 1336; paragraph three of the complaint (R. 2) alleges the action was brought pursuant to Title 28 U.S.C. §§ 1398, 2284, 2321 through 2325, and to § 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009, (Appendix A, pages 10a-12a) which provides for judicial review of every final agency action and specifies the scope of such review. The opinion of the lower court acknowledged that its jurisdiction was based on the cited sections of 28 U.S.C. (R. 387). None of these provisions permit *de novo* proceedings; all are concerned with the procedures, methods and scope of judicial review. The Answer of the North Western in paragraph one admitted the allegations contained in paragraphs one, two and three of the complaint (R. 320, 321).

The Government and Commission evidently do not share the North Western's illusion that the lower court decided the matter before it *de novo*. Their Memorandum does not mention the term, and paragraph I of their answer similarly admits paragraphs 1, 2 and 3 of the Complaint (R. 317). Paragraph II of their answer alleges the action is one to review on order of the Commission based on the record made before the Commission (R. 317-318). The Government's and Commission's motion to dismiss a portion of the Complaint (R. 376, 377), moreover, acknowledges the presence before the district court of the same two issues described in its opinion (R. 387).

As the District Court observed (R. 387), the complaint presented ". . . two issues for determination: (1) Whether the Commission's finding that the Republic Junction track-

age constitutes an 'extension' within the meaning of Section 1(18) is correct; and if so, (2) whether the order of the Commission denying a certificate of public convenience and necessity is supported by substantial evidence." Both issues present reviewable questions, and both contemplate an examination of the record of the Commission proceedings to see whether the Commission has erred as a matter of law. *United States* v. *Maher*, 307 U.S. 148, 152 (1939); *United States* v. *Idaho*, 298 U.S. 105 (1936). The second issue was not adjudicated by the lower court because it was not necessary to do so in view of its decision on the first (R. 392). The first issue also does not contemplate the reception of new evidence and a new factual adjudication by the district court; rather, it is directed to an inquiry whether the Commission's assumption of jurisdiction in the matter before it was correct under the law. Indeed, the record before the lower court was the record before the Interstate Commerce Commission, portions of which constitute the transcript of record on this appeal (R. 14-317, 378-379).

This litigation before the lower court manifestly was not a *de novo* proceeding. The lower court based its decision, as it was required to do, on the evidence adduced before the Commission, *Tagg Bros.* v. *United States*, 280 U.S. 420, 443-444 (1930), and the Commission's interpretation of the law. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943); 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 168-169 (1962). Appellant's argument therefore is based on the completely false premise that the lower court decided the issues before it *de novo*. It did not; the proceeding was one to review the Commission's orders, and the lower court did precisely that.

The lower court's decision purports only to have reviewed the Commission's erroneous finding that Republic Junction is a § 1(18) extension. This finding was based upon the Commission's interpretation of the law applicable to its jurisdiction over such a matter on the authority of *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266 (1926), and the other decisions cited in its Report.[9] (R. 296-299). The district court decided that these cases and the reasons advanced by the Commission in support of its jurisdiction were not applicable to the jurisdictional facts found by the Commission, which are undisputed. (R. 388-392). The lower court's abundant discussion of the facts of record in the Commission proceedings can leave no doubt the Commission record was thoroughly reviewed. Whether this determination be characterized as "law-fact" or pure law, the result was that the Commission's error in applying the statutory and decisional law to the facts before it was laid bare and corrected. Correcting a Federal agency's errors of law clearly is a proper function of the court reviewing its orders. *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 144-145 (1940); *King* v. *United States*, 344 U.S. 254 (1952); *Public Serv. Comm.* v. *United States*, 356 U.S. 421 (1958).

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[9] *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga., 1957); *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540 (E.D. Mich., 1923); *Citizens of Pipestone* v. *Chicago, M. & St. P. Ry. Co.*, 167 Minn. 174, 208 N.W. 809 (1926), on reargument, 167 Minn. 177, 213 N.W. 534 (1926); *El Dorado & W. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 5 F.2d 777 (C.A. 8, 1925); *Charleston & W. C. Ry. Co. Construction*, 166 I.C.C. 707 (1930); *Great Southwest Railroad, Inc., et al. Construction*, 295 I.C.C. 829 (1958).

B. Appellant Confuses Unassailable Facts Found By the Commission With the Jurisdictional Finding They Underlay and Mistakenly Says the Latter Is Not Reviewable.

The facts upon which the Commission's assertion of jurisdiction is based were found by it on the testimony adduced and the exhibits admitted at the hearing of the application and complaint cases (R. 93-279). They are undisputed, and the lower court of course could not purport to change or modify them. *Federal Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

But the North Western would clothe the Commission's conclusion deduced from such underlying facts with the same impregnability. Its argument places the Commission's jurisdictional finding or conclusion on the same level as the finding, for example, that the connection is 262 feet long. The law does not foreclose the inquiry of a reviewing court into a jurisdictional conclusion of the Commission as it prohibits any modification of its evidentiary findings. *Labor Board* v. *Waterman S.S. Co.*, 309 U.S. 206, 208-209 (1940).

If a finding or conclusion of the Commission is affected by an error of law whereby its statutory jurisdiction is exceeded, the reviewing court must correct the error and annul the decision. *Acker* v. *United States*, 298 U.S. 426, 434 (1936); *Alton R. Co.* v. *United States*, 287 U.S. 229, 238-239 (1932). Such a function is imposed upon reviewing courts by section 10(*e*) of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009(e), (Appendix A, pages 10a-12a), which governs judicial review of agency orders, including those of the Interstate Commerce Commission. *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S. 173 (1959). This statute provides that

". . . the reviewing court shall decide all relevant questions of law. . ." and set aside agency action ". . . not in accordance with law; . . ."

If an administrative tribunal has misconceived the law, its decision cannot stand. *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943).

The decision of the lower court thus corrected the Commission's erroneous interpretation of the law relating to its jurisdiction over Republic Junction just as errors of law as to the adequacy of findings and sufficiency of evidence may be corrected. *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156 (1962); *Interstate Commerce Comm.* v. *J-T Transport Co.*, 368 U.S. 81 (1961). Regardless of the proper scope of the lower court's function or the weight to be accorded the Commission's determination, it can hardly be questioned, as does appellant in this appeal, that such review was proper in this litigation.

C. The Question of the Commission's § 1(18) Jurisdiction Decided Below Is One of Statutory Construction For the Court, Not the Commission, to Finally Decide.

The North Western contends that the same standards governing judicial review; for example, of the denial of a public convenience and necessity certificate on the merits, *United States* v. *I.C.C.*, 337 U.S. 426 (1949); *Columbia System* v. *U.S.*, 316 U.S. 407 (1942); *Fed. Power Comm'n* v. *Pacific Co.*, 307 U.S. 156 (1939), are appropriate on review of the Commission's assumption of jurisdiction over Republic Junction under § 1(18). In the former class of cases the expertise of the agency, if supported by substantial evidence and not arbitrary, must be accorded full effect, *Federal Power Comm.* v. *Idaho Power Co.*, 344 U.S. 17 (1952); *New York* v. *United States*,

331 U.S. 284 (1947), because the matter is one within the Commission's specialized knowledge.

In contrast, however, the issue decided by the lower court, that the connection is exempt from the Commission's § 1(18) jurisdiction by the operation of § 1(22), presents a problem, not of what is the fact the evidence shows, but rather, which of the two Federal statutes applies to the evidentiary facts found. The construction of the statute determines whether initially the Commission has power to exercise its administrative expertise over the subject matter of the application presented to it. The lower court did not set aside the order of the Commission for error or irregularity as to any matter within the scope of its delegated power to determine; it denied the jurisdiction of the Commission to act at all. *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958).

In *Texas & Pac. Ry.* v. *Gulf, Etc., Ry.*, 270 U.S. 266, 272 (1926), the Court paraphrased an argument of counsel which anticipated the North Western's argument on this appeal by 38 years:

> "It is argued that the issue whether tracks constitute an extension presents an administrative question; that the Commission has power to decide it, because Congress, by conferring authority to determine whether an extension is compatible with the public interest, has by implication conferred authority to determine also the subordinate question whether a proposed track constitutes an extension; . . ."

This Court rejected this contention because the Commission's function under § 1(18) is comparable to a determination of the propriety of a rate or rule and that of a court is to construe a statutory provision and apply it to the facts. The lower court in this litigation did no more than this, and this Court has often affirmed that

such statutory construction is a proper exercise of the judicial power to review Commission orders.

United States v. *Idaho*, 298 U.S. 105 (1936), is particularly in point since it involved an appeal from a commission order authorizing an abandonment under § 1(18). On the precise question here in issue, whether a track is within § 1(18) or § 1(22), this Court said at 298 U.S. 109-110:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or state commission.
>
> "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction . . . Here, the jurisdiction of that Commission was challenged."

In this case the Commission had issued a § 1(18) certificate permitting abandonment of a track to a mine. The State of Idaho sued to annul and enjoin the order on the ground the track was a § 1(22) spur track, and the three-judge court agreed. On appeal this Court affirmed. In this litigation also the Commission and Government argued that the findings and order of the Commission were conclusive because made on substantial evidence. This Court, as it did in the *Texas* decision, held that the question is one of jurisdiction for the Court, 298 U.S. 109.

The decision in *Piedmont & Nor. Ry.* v. *United States*, 280 U.S. 469, 476 (1930), observed.

> "The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute."

This suit was an appeal from a Commission order overruling a motion to dismiss a § 1(18) application on

the ground the interurban exemption of § 1(22) applied to the new construction and denying the certificate sought. The lower court held the construction was an extension and dismissed the complaint. This Court affirmed because the Commission's order was negative.[10] In *Powell* v. *United States*, 300 U.S. 276, 287 (1937), this Court emphasized that the decision of such a question is a matter of statutory construction for a court, not an administrative one such as whether the project is in the public interest.

Regardless of the current status of the so-called "law-fact formula" (Appellant's Brief, page 30), the business of construing a statute is within the domain of a court of law, and not exclusively within the area of the Commission's administrative expertise. *Texas* v. *United States*, 292 U.S. 522 (1934), construed § 5 of the Interstate Commerce Act and decided the scope of the Commission's authority under it, and the decision in *United States* v. *Amer. Trucking Ass'ns*, 310 U.S. 534, 544 (1940), declared that:

> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function."

This Court again construed § 5 of the Interstate Commerce Act on an appeal from a Commission order and applied the statute to the facts of the case before it in *United States* v. *Marshall Transport Co.*, 322 U.S. 31 (1944).

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[10] The "negative order" doctrine, of course, is no longer a guiding rule. *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125, 143 (1939); *United States* v. *I.C.C.*, 337 U.S. 426, 432-433 (1949).

Labor Board v. *Highland Park Co.*, 341 U.S. 322 (1951), was a suit to enforce an order of the Board assailed as beyond its power. This Court stated at page 325:

> "It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct."

Federal Communications Comm. v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1953), held that an agency disposition based upon the agency's view of a principal it derived from a statute, and not on matters within its own special competence, left for the court the construction of the statute and the determination of the governing principal.

Thus, where an agency disposes of a proceeding on the basis of what it deems to be the judicial view of the matter rather than by factors within its special competence, the court is not precluded from making its own independent judgment as to how the statute applies to the facts. *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960); *American Trucking Assns.* v. *U. S.*, 364 U.S. 1, 13-14 (1960). Where, as here, the question related to the jurisdiction of the Commission as opposed to that of a state agency, this Court construed and applied to the facts of the matter the mutually exclusive provisions of § 13a(1) and § 13a(2) of the Interstate Commerce Act,[11] in *New Jersey* v. *New York, S. & W. R. Co.*, 372 U.S. 1 (1963).

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[11] Sec. 5 of the Transportation Act of Aug. 12, 1958, P.L. 85-625, 72 Stat. 571, 49 U.S.C. § 13a.

The North Western's argument that the lower court should have accepted the agency's findings as to its jurisdiction is untenable and wholly inconsistent with the function of the District Court on review of the question presented in this litigation to construe and apply § 1(18) and § 1(22) to the jurisdictional facts at bar. The courts, not the Commission, possess the specialized knowledge and the necessary expertise, and have the power and duty, to construe Federal statutes.

D. It Is For the Courts, Not the Commission as Appellant Contends, To Determine the Scope of the Commission's Jurisdiction.

Appellant contends that the lower court erroneously failed to accord proper weight to the Commission's finding that it had § 1(18) authority over the connection and that the Commission's findings should not be set aside except for an abuse of discretion or the lack of substantial supporting evidence. This theory elevates those findings to a status out of harmony with the law governing administrative tribunals. The jurisdiction of the Commission was delegated to it by Congress and extends no further than such delegation. It must be found within "the four corners of the statute" and the determination thereof is a judicial function for the courts—not the Commission. For the Commission itself to adjudicate the bounds of such delegation is unthinkable unless its expertise extends beyond administrative functions into the realm of constitutional law.

Had Congress presumed to delegate expressly to the Commission the power to make the final determination in §§ 1(18)-1(22) matters so as to preclude judicial in-

quiry into its jurisdiction, there would be serious doubt whether the statute would be constitutional because contrary to § 10 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. § 1009 (Appendix A, pages 10a-12a). *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955).

St. Joseph Stock Yards Co. v. *U.S.*, 298 U.S. 38, 51 (1936), held that the legislature may endow an agency with power to find facts, in which case judicial scrutiny goes no further than to ascertain whether evidence supports the findings, and questions of the weight of the evidence are left to the agency; but that just as direct legislative action is subject to judicial review, judicial inquiry cannot be precluded by a legislative delegation to an agency of the power to make "final" findings. *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956). An agency may not decide the limits of its own power. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368 (1946).

The scope of the statute giving the Commission its authority to act is decisive of the question whether it has acted within its jurisdiction, and in this case § 1(22) is a limitation on the scope of the Commission's jurisdiction. *Connecticut Co.* v. *Power Comm'n*, 324 U.S. 515, 526-531 (1945). In this case the Federal Power Commission had asserted power to regulate the accounting practices of a power company which challenged the Commission's jurisdiction over it pursuant to the exemption of § 201(a) of the Federal Power Act of Aug. 26, 1935, c. 687, 49 Stat. 847, 16 U.S.C. § 824(a). The Court construed the statute and pronounced the limits it placed upon the power of the Commission, and held the power company was exempt.

Such construction was no intrusion upon the legislative power. *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618 (1944).

The Commission agrees that the question whether a track is a § 1(18) extension or a § 1(22) track is one for the ultimate determination of a court, not of the Commission. In *Leelanau Transit Co. Abandonment, Northport Branch*, 307 I.C.C. 95, 102 (1959), it stated:

> "The Supreme Court of the United States has held that whether trackage is a 'spur' is a mixed question of law and fact left by Congress to the decision of a competent court, not to final determination of either the Federal or a State commission."

This decision at the same page also observed that the Commission must make a finding as to its own jurisdiction in the first instance. We do not contest this necessity and understand *Yonkers* v. *United States*, 320 U.S. 685 (1944), as requiring it. But we cannot ascribe to these cases any implication removing from judicial scrutiny on review the finding so made.

There can be no question of a courts' power on review to determine whether an agency has acted within its authority and the proceeding need not be *de novo* to be judicial. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 278 (1933); *Rochester Tel. Corp.* v. *U. S.*, 307 U.S. 125, 133-134 (1939). The North Western contends for a state of affairs condemned in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 136 (1951), which would permit the Commission to make findings plainly outside the scope of its authority and then to invoke a theory of an unassailable administrative construction to protect its claim of jurisdiction. Regardless of the weight to be accorded the Commission's assertion of § 1(18) jurisdictoin over the connection at Republic Junction, administrative construc-

tion of the statute delegating that jurisdiction "never has been carried so far as to permit administrative discretion to run riot." 341 U.S. 138. In the instant appeal the Commission should not be permitted to declare § 1(18) jurisdiction over railroad tracks the court below has held are exempt therefrom under § 1(22) of the Act.

E. Appellant's "Keystone" Case, Shields v. Utah Idaho R. Co., Is Not In Point With This Appeal Because, Here, the Lower Court Did Not Decide a Matter Delegated Exclusively To the Commission As It Did In Shields.

This court's holding in *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177 (1938), that the district court had no jurisdiction in *de novo* proceedings to issue an injunction restraining attempts to enforce an order of the Mediation Board requiring the railroad to comply with § 151 of the Railway Labor Act, added by sec. 1 of the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. § 151, (Appendix A, pages 7a-10a) is no authority in this case for appellant's contention, because the lower court here did not decide *de novo* the question before it. That case is also distinguishable from this in that the determination there made by the Interstate Commerce Commission was pursuant to the Congressional mandate of § 151 of the Railroad Labor Act, committing to the Commission the duty, as this court described it at 305 U.S. 180, 181, to determine conclusively a fact question in accordance with procedural due process, not under the Interstate Commerce Act, but under the cited provision of the Railway Labor Act, which determination in turn would provide a factual basis for action by the Mediation Board. Thus, in that case the Commission decided a matter expressly com-

mitted to its administrative judgment, it did not decide a question of statutory construction whether the railroad involved was exempt or not from Commission jurisdiction. Its factual determination in the *Shields* case decided only whether the railroad was exempt as an interurban electric railway from the jurisdiction of the Mediation Board pursuant to the Railway Labor Act.

The case held that because the delegation by Congress of this fact finding function to the Interstate Commerce Commission was valid and because procedural due process had been observed in making the determination, the determination had become binding on both the railroad and the Mediation Board. In contrast, the question before the lower court in this case was whether the Commission had properly asserted its own jurisdiction over the tracks. There is nothing in §§ 1(18) through 1(22) expressly committing such a judicial adjudication to the Interstate Commerce Commission. None of the cases cited by the North Western (Appellant's Brief, pages 17-31) hold that the Interstate Commerce Commission has been delegated the exclusive responsibility to construe sections of the Interstate Commerce Act here involved.

United States v. *Jones*, 336 U.S. 641 (1949), similarly held the court of claims had no jurisdiction to exercise a function expressly committed to the Interstate Commerce Commission. This was a rate making case arising under the Railway Mail Pay Act of July 28, 1916, c. 261, 39 Stat. 425, 39 U.S.C. §§ 523-568. The court of claims had awarded a money judgment by way of increased compensation for carrying government mail after the Interstate Commerce Commission had twice denied the railroad an increase in

pay for this service, as this court observed in *United States* v. *Griffin*, 303 U.S. 226 (1938). The Court held in the *Jones* case that the Railway Mail Pay Act delegates to the Commission exclusive jurisdiction to fix reasonable rates for rail carriage of mail and that such a determination is essentially legislative, not judicial. 336 U.S. 652. Thus this Court decided that the court of claims had intruded upon the domain reserved exclusively to the Commission by disregarding the expert informed contrary judgment of the Commission in matters committed to its special competence, 336 U.S. 641, and had reversed as errors of law matters of fact and expert judgment, not legal questions as were before the lower court in the instant litigation.

United States v. *Drum*, 368 U.S. 370 (1962), similarly concerns an instance of express Congressional delegation to the Commission of the power to make a final and exclusive factual decision. That case arose out of a Commission investigation pursuant to § 204(c), Part II of the Interstate Commerce Act, sec. 204(d) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 547, 49 U.S.C. § 304(c), as amended (Appendix A, page 6a), to determine whether certain carriers were contract carriers subject to § 209(a) of the Act, sec. 209(a) of the Motor Carrier Act, 49 Stat. 552, 49 U.S.C. 309(a). (Appendix A, pages 6a-7a). Section 204(c) specifically authorizes the Commission to make such an investigation and decide whether a motor carrier has failed to comply with any provision of Part II. Such an investigation does not lead to an order judicially reviewable since it is only preparation for future action by the Commission. *United States* v. *Los Angeles R.R.*, 273 U.S. 299, 310 (1927).

The resolution of the question in the *Drum* case depended, not upon the application of the statute as does

the question whether the Commission has jurisdiction under § 1(18), but upon the facts which the administrative tribunal, not a court, has the necessary expertise to appraise. The Commission thus decided only a matter clearly within the scope of its mandate and lawful by the same standards any issue of public convenience and necessity is lawful under Part I of the Interstate Commerce Act.

In *State of Illinois* v. *United States,* 213 F. Supp. 83 (N.D. Ill., 1962), affrmed *per curiam,* 373 U.S. 378 (1963), the district court upheld the Commission's § 1(18) jurisdiction to authorize abandonment of operations of the Chicago, North Shore & Milwaukee Railway against the contentions of the State of Illinois that the railway was exempt under the interurban provision of § 1(22) from the Commission's jurisdiction. Prior decisions of this Court had held that the railway was within the interurban exemption of § 20a of the Interstate Commerce Act, and that it had been so decided pursuant to § 151 of the Railway Labor Act and under § 77 M of the Bankruptcy Act. In denying the state's claim of exemption pursuant to § 1(22) the district court stated at 213 F. Supp. 87-88:

> "It is apparent from the decisions following the Supreme Court North Shore case that exemptions similar to Section 1(22), but which are found in other provisions of the Interstate Commerce Act, or in other Acts, allow different interpretations, depending on the purpose of the Act, the underlying issues, and the particular facts of the case."

Thus the exemption of § 1(22) is not to be read in *pari materia* with similar exemptions in other acts. Appellant's reliance on this case is at odds with its reliance on the

Shields case in that the *State of Illinois* decision holds that the decisions of the Commission under § 151 of the Railway Labor Act are not authority for decisions under §§ 1(18)-1(22) of the Interstate Commerce Act.

III.

The Outright Reversal of the Lower Court Sought By the North Western In This Court Is Neither an Appropriate Nor a Complete Remedy.

The North Western requests this Court to reverse the decision of the lower court but does not suggest, in that event, that a remand would be proper. The North Western therefore fails to consider that the lower court decided only one of the two issues presented to it (R. 392), that the Commission had no jurisdiction to permit or forbid operations over Republic Junction. In the event this decision must be reversed, which we do not believe, there remains pending the second issue whether the findings and conclusions of the Commission are supported by substantial evidence of record (R. 387-392). Reversal of the judgment of the lower court thus would require remand of the cause to the District Court for the Eastern District of Wisconsin so that the remaining issue of the propriety of the Commission's denial of the application for a § 1(18) certificate could be adjudicated. *Western Pacific* v. *South. Pac. Co.*, 284 U.S. 47 (1931).

CONCLUSION

For the reasons stated herein, the three-judge District Court properly set aside the Commission's order on the ground Republic Junction was a § 1(22) track outside the Commission's § 1(18) jurisdiction. The judgment below should be affirmed.

Respectfully submitted,

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September 23, 1964

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois the 23d day of September, 1964.

FRANK M. LONG

APPENDIX A

Texts of Pertinent Statutes Cited Herein

I. Interstate Commerce Act, Part I:

Sec. 1(18): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U.S.C. § 1(18); as amended:

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

Sec. 1(20): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(20):

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad,

or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Sec. 1(21): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(21):

"The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the

expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Sec. 1(22): sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 478, 49 U.S.C. § 1(22):

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Sec. 3(4); sec. 405 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 479, 49 U.S.C. § 3(4), as amended:

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Sec. 15(3), as amended by sec. 10(b) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 911, 49 U.S.C. § 15(3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Sec. 15(4), as amended by sec. 10(b) of the Transportation Act of Sept. 18, 1940, c. 722, 54 Stat. 911, 49 U.S.C. § 15(4):

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) re-

quire any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

II. Interstate Commerce Act, Part II:

Sec. 204(c); sec. 204(d) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 547, 49 U.S.C. § 304(c), as amended:

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Sec. 209(a); sec. 209(a) of the Motor Carrier Act of Aug. 9, 1935, c. 498, 49 Stat. 552, 49 U.S.C. § 309, as amended:

> "Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided,* That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in

furnishing seasonale service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: *Provided further*, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States."

III. Railway Labor Act of May 20, 1926:

Sec. 1; sec. 1 of the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. § 151; as amended:

"Section 1. When used in this Act and for the purposes of this Act—

First: The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

"Third. The term 'Mediation Board' means the National Mediation Board created by this Act.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

"Seventh. The term 'district court' includes the United States District Court for the District of Columbia; and the term 'court of appeals' includes the United States Court of Appeals for the District of Columbia.

"This Act may be cited as the 'Railway Labor Act.'"

IV. Administrative Procedure Act of June 11, 1946, c. 324:

Sec. 10, 60 Stat. 243, 5 U.S.C. § 1009:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess

of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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No. 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF OF APPELLANT CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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1. A material inaccuracy in appellees' answering brief compels this reply. At page 16, referring to the "seven" Commission decisions cited by North Western which establish I.C.C.'s jurisdiction over new interchanges appellees assert that "[n]one of these decisions support appellant's construction because in none was the question of the Commission's jurisdiction raised by counsel or adjudicated by the Commission."

In fact, North Western's basic brief cited *ten*, not seven, such decisions, each supporting this proposition. While not all ten recite denial of jurisdictional motions, they evidence clearly the widespread industry practice of seeking I.C.C. authority for new interchanges, a practice extending over many years. Appellees have simply ignored three of them in asserting that none actually adjudicate the issue of I.C.C. jurisdiction. Appended to this reply are copies of two of the decisions avoided by appellees: *Toledo, P. & W. R.R.—Trackage Rights,* 307 I.C.C. 801 (not printed in full in the official reports, 1958) (Appendix 14 to 38) and *Great Southwest R. Co.—Construction,* 295 I.C.C. 829 (not printed in full in the official reports, 1958) (Appendix 1 to 13). At the request of North Western,[1] the Commission's Secretary certified to the Clerk of this Court[2] copies of these decisions, which are reprinted in the appendix to this reply.

As stated in North Western's opening brief,[3] the Commission in *Toledo*[4] denied a requested finding that it lacked jurisdiction[5] of an application for North Western and Toledo to operate over 519.8 feet of connecting track costing a total of $25,468.00.[6] Weighing the limited capital outlay required to establish this simple facility against its

1. Letter of September 29, 1964 from John C. Danielson to Harold D. McCoy, Secretary of the Interstate Commerce Commission, a carbon of which was lodged with the Clerk of this Court.

2. Letter of September ..; 1964 from Harold D. McCoy, Secretary, to John F. Davis, Clerk of this Court.

3. Brief of Appellant North Western at page 11, footnote 10.

4. *Toledo, P. & W. R.R. Trackage Rights* set out in full at Appendix 14 to 38.

5. Appendix 14 at page 15.

6. Some $3,222.00 less than appellees expended here at Republic Junction.

commercial and competitive significance,[7] the Commission held:[8]

> Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

Similarly, in *Great Southwest R. Co.—Construction*, 295 I.C.C. 829 (1958)[9] the Commission granted Rock Island a certificate to operate a new interchange over an existing track 1.79 miles long and granted Texas & Pacific authority to build ½ mile of track and to operate a new interchange over it. Over a motion to dismiss,[10] based on Section 1 (22), the Commission held (at page 3 of the Appendix) that:

> the proposed line of the Texas and Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the construction and operation contemplated by Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244.

It may also be noted that in abandoning interchange connecting tracks like these at Republic Junction appellee Milwaukee has requested and received §1 (18) authorization from the Commission. *Chicago, M.St.P. & P. R.R. Abandonment*, 254 I.C.C. 821 (Div. 4 1943).

Thus I.C.C.'s long-standing interpretation has received even appellees' acquiescence for over 20 years, and, since

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7. Appendix 14 at pages 24-27, 30-37.

8. *Id.* at 18.

9. Appendix 1-13. Note carefully that Rock Island there requested and received authority to operate a new interchange over *existing* track (Appendix 1 at 3 and 12). See also *Chicago, B. & Q. R. Co., Operation*, 282 I.C.C. 249 at 252-253 (Div. 4 1951) and *Illinois Term. R. Co., Construction*, 290 I.C.C. 342, 343 (Div. 4, 1954).

10. *Id.* at 3.

all signposts of congressional intent and the prior decisions of this Court support its decision here, the Commission decision should be affirmed. See *Maintenance of Way Employees* v. *United States*, 366 U.S. 169 at 179.

2. Appellees appear to persist in the position that reviewing courts must independently redetermine the scope of I.C.C.'s jurisdiction.[11]

The district court here, unhampered by the Commission's findings on the substantive economic issues, chose to determine for itself (R. 388) whether the new operation constituted "an extension" of operations. Relying entirely upon the "invasion" theory of *Texas & Pacific* (R. 388-389) the court squarely held (R. 390) that "[t]he fact that a new 'through route' is opened does not make the track an extension of [appellees'] lines." Equating "extensions" of operations under the statute with "invasion of territory," since no physical invasion had occurred, said the court (R. 390-391), the Commission should have had no concern with the new operation.

We submit that the statute admits of no such simple interpretation for as this Court recognized as early as 1933[12] "an extension . . . need not . . . be a building into a new and previously unserved locality." Instead,

11. Appellees' brief at 45-60 argues that this type of redecision on review does not amount to *de novo* determination. Our point is simply this—the independent redecision of this point by the lower court, although no new evidence was taken, amounted to a *de novo* determination. The restricted use of this term is of course readily apparent.

12. *I.C.C.* v. *Oregon-Washington R. Co.*, 288 U.S. 14 at 39. Note that this decision (*id.* at 38-39) itself relies upon *Alabama & Vicksburg*.

whether a physical invasion or not, where a proposed operation or connection creates significant new carrier competitive relationships, two clear decisions of this Court require the Commission to resolve the new economic equation, and to permit the proposed operation only if it (the Commission) is satisfied that public benefits are probable. This was the holding in *Alabama & Vicksburg*[13] as in *Piedmont*,[14] both decisions stressing (as did the Commission here) that the connection, if constructed, would establish new through routes and alter irrevocably existing carrier competition. After observing the traffic relationships among carriers for over 50 years, Congress in the 1920 Act determined[15] that these competitive relationships could be altered by constructing new facilities only if the Commission were convinced that the public good would be enhanced by the proposed construction. The Commission, not the district courts, was established as the body to gauge both the competitive impact of a proposed connection and its public effect. This the Commission did, noting how operation of connecting tracks which permit the creation of new competitive through routes has uniformly been held subject to its § 1 (18) jurisdiction (R. 298-299) and finding (R. 312) that the diversion caused by this new connection would ultimately injure the public by impairing existing carriers' ability to provide an already adequate service. Its mandate to measure this competitive impact is of course laid down in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299 at 310-312,[16] and the

13. See pages 10-11 of North Western's brief.

14. *Piedmont & N. Ry. Co.* v. *I.C.C.*, 286 U.S. 299, set out at pp. 14-15 of our brief here.

15. See pages 14-15 of our brief herein.

16. See pages 14-15 of our brief herein.

Alabama & Vicksburg case,[17] reinforced by the requirements of the *Yonkers* cases.[18] While certain turn of the century cases upon which appellees (like the lower court) rely[19] do suggest that the court, not the Commission, ought to apply these statutory tests to any proposed construction, the context in which those decisions arose has long since disappeared.

Mr. Justice Brandeis in the *Texas & Pacific* case[20] reasoned at that time that the only remedy for a person protesting new construction or operation for which the carrier sought no I.C.C. authority lay in an action under § 1(20)[21] in a one-judge court. It followed, therefore, that the court alone ought to determine the jurisdictional issue, in deciding whether or not to force the parties before the Commission. But since that time as this record (R. 125) reveals, the Commission has evolved a practice of itself bringing reluctant railroads before it to resolve that issue. This was done also in the *Toledo Interchange* case (Appendix 14 at page 18) and this practice was noted by Judge Friendly in *Long Island R.R.* v. *New York Central R. Co.*[22]

Since the Commission has shown itself fully competent to cope with unauthorized expansion and to apply trans-

17. See pages 10-12 of our brief herein.

18. See pages 21-22 of our brief herein.

19. *United States* v. *Idaho*, 298 U.S. 105; *Powell* v. *United States*, 300 U.S. 276.

20. *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266.

21. *Id.* at 273-274.

22. Noted at length at pages 28-29 of our brief herein, the decision is printed at 281 F.2d 379, 383-384 (2d Cir. 1960).

portation standards to these statutory criteria, there should be no occasion any longer for complete judicial redecision of this indispensable finding of jurisdiction or its lack. The more recent decisions by the federal courts, uniformly affirmed here,[23] hold that instead of inventorying physical facilities and counting the ties and feet of track, the Commission is to determine the significance of new connections by their commercial and competitive import, and that its analysis of these factors, if supported by precedent and the agency's record, will be sustained.

Like the District Court for Northern Illinois,[24]

> "We think these two Supreme Court opinions settle the question of the scope of judicial review so that we may conclude that although this court is not bound by the determinations of the Commission and that the doctrine of 'substantial evidence' is not specifically applicable, nevertheless great weight must be given to the determination of the Commission in an order such as this in which its special competence is clearly recognized."

If so, the lower court erred significantly in holding I.C.C.'s action "incidental (R. 388)" and ruling this connection "too small a matter to require the attention of the Interstate Commerce Commission . . . (R. 391)," because, as this Court ruled recently in *United States* v. *Drum*, 368 U.S. 370 at 376, where the Commission's resolution of this issue is consistent with the coherent body of administrative and judicial precedents so far developed in this area,

23. *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D. Ill. 1962), aff'd. 373 U.S. 378; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga. 1957), aff'd. 356 U.S. 273.

24. *State of Illinois* v. *United States*, 213 F. Supp. 83 at 89 (N.D. Ill. 1962), aff'd. 373 U.S. 378.

there is no occasion for the District Court to disturb its conclusion.

Respectfully submitted,

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October, 1964

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

Interstate Commerce Commission

Finance Docket No. 19786[1]

GREAT SOUTHWEST RAILROAD INC., ET. AL.—
CONSTRUCTION, ETC.

Decided June 3, 1958.

1. Certificate issued authorizing (a) construction, acquisition, and operation by Great Southwest Railroad, Inc., of a line of railroad within and serving property being developed as an industrial district by Great Southwest Corporation; (b) construction and operation by The Texas & Pacific Railway Company of a line of railroad connecting its main line with the line of Great Southwest Railroad, Inc.; and (c) operation by the Chicago, Rock Island & Pacific Railroad Company, in interstate and foreign commerce, of an existing interchange track extending from a connection with its main line to a connection with the line of Great Southwest Railroad, Inc., all in Tarrant County, Tex. Conditions prescribed.

2. Authority granted to Great Southwest Railroad, Inc., to issue not exceeding 12,000 shares of common stock of the par value of $100 per share.

REPORT OF THE COMMISSION

Division 4, Commissioners Mitchell, Arpaia, and McPherson

[1] This report also embraces Finance Docket No. 19787, Great Southwest Railroad, Inc., Stock.

By Division 4:

The Great Southwest Railroad, Inc. (Great Southwest), on June 3, 1957, applied under section 1(18)-(20) of the Interstate Commerce Act, as amended, for authority to construct and operate a line of railroad, or to acquire and operate segments of a line previously constructed by others, to serve property being developed as an industrial district by Great Southwest Corporation (development corporation) and plants located therein. The line would extend from a proposed connection with the line of the Chicago Rock Island and Pacific Railroad Company (Rock Island) at the northern boundary of the industrial district, near Dorothy, to a proposed connection with The Texas and Pacific Railway Company (Texas & Pacific) at the district's southern boundary, near Orme, approximately 6.86 miles, together with 2.97 miles of secondary tracks, all in Tarrant County, Tex., Finance Docket No. 19786.

Coincidentally therewith, Great Southwest applied under section 20a of the act for authority to issue not exceeding $1,200,000 of common stock, consisting of 12,000 shares of the par value of $100 each, Finance Docket No. 19787.

The Texas & Pacific, the Rock Island and several railway labor organizations intervened in the proceedings as their interests might appear. The applications were consolidated for hearing and a hearing was held, at which time Great Southwest stipulated that it seeks a certificate and authorization to operate only as a terminal switching railroad to the property involved. Service of a proposed report in these proceedings was waived by the parties thereto. No representations have been made by State authorities. All points mentioned herein are in Texas unless otherwise stated.

Subsequent to the hearing, the Rock Island, a common carrier by railroad subject to the provisions of part I of the act, on March 3, 1958, filed a supplemental application in these proceedings under section 1(18)-(20) of the act requesting authority to extend its line by operating in interstate or foreign commerce an existing interchange track, a portion of which is known as the Dorothy Spur, which connects with Rock Island's main line at Dorothy and extends to a connection with the line proposed to be constructed or acquired by the Great Southwest, approximately 1.79 miles in Tarrant County, Tex.

By second supplemental application filed March 27, 1958, in these proceedings, the Texas & Pacific, also a common carrier by railroad subject to the provisions of part I of the act, applied under the same section for authority to construct a line of railroad extending from a point on its main line at milepost 231.26 to a connection with the proposed line of Great Southwest, approximately 2,865 feet, in Tarrant County, Tex. Contemporaneously with the filing of the supplemental application, Texas & Pacific filed a motion to dismiss its application, alleging that we were without jurisdiction in the matter. Subsequently, the motion was withdrawn without prejudice to the right of that company again to raise the same jurisdictional question in subsequent proceedings. As shown in the following discussion, however, the proposed line of the Texas & Pacific will connect 2 common carriers subject to our jurisdiction and will provide a new route for transportation in interstate commerce, in which the Texas & Pacific will participate. It is our view that the construction and operation contemplated by the Texas & Pacific are within our jurisdiction. See *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244.

The Great Southwest is a Texas corporation organized by the development corporation to construct or acquire,

own, maintain and operate a line of railroad involved in its application. Its capital stock, consisting of 12,000 shares of the par value of $100 per share, has been subscribed for by individuals who are financially interested in or otherwise closely associated with the development corporation. Under present plans, the stock subscribed for by these individuals, with the exception of one share each, will, when issued, be held by them in trust for or transferred to the development corporation.

The development corporation was formed primarily for the purpose of providing industrial sites and encouraging industrial growth in the Arlington-Grand Prairie area. Based on favorable studies made by research organizations and specialized consultants, it was concluded that the Fort Worth-Dallas area is a dominant distribution center for a territory embracing the States of Texas, Oklahoma, Arkansas, Louisiana, New Mexico, Mississippi, Kansas, Colorado, Missouri, Tennessee, Alabama and Arizona. As a result, the development corporation has presently invested in excess of $10,000,000 in the purchase and development of certain land in the area. It now owns or controls, by long-term lease, 3,000 acres of land within the city limits of Arlington and Grand Prairie, situated midway between Fort Worth and Dallas. The main-line tracks of the Rock Island generally parallel the northern boundary of the property approximately 2 miles to the north thereof. The Amon Carter Field (an airport constructed by the city of Fort Worth) lies to the north of the trackage. The property is bounded on the south by U. S. Highway 80. The main tracks of the Texas & Pacific between Fort Worth and Dallas are adjacent to and parallel the highway. The Dallas-Fort Worth Turnpike bisects the district in an East-West direction and the future Great Southwest Expressway (now State Highway 360) bisects the property in a North-South

direction. The district presently is being developed into a planned industrial area which will not only provide plant sites for prospective industries, public warehousing, and recreational facilities for employees but will provide public utility services, including rail transportation to the industries locating therein. At the present time the development corporation has under construction the first unit of its pubilc warehouse which will contain 190,000 square feet of storage space, a club-restaurant, a sports center, and 3 multi-purpose industrial buildings totaling 100,000 square feet which are now available for sale or lease. All streets and drainage structures, together with the sanitary sewer, water, and initial gas lines, have been installed north of the turnpike. Electric power and telephone lines were being installed at the time of the hearing in this proceeding. Negotiations with numerous prospective customers for plant sites disclose that all will require rail service and sidings.

The district, designed to attract manufacturing and distribution industries, has been planned to afford all locating therein a connection with the Texas & Pacific and the Rock Island railroads. At the outset, the development corporation endeavored to make available the services of both carriers over a single set of tracks, but that plan proved unworkable. Under the circumstances, it was decided to organize Great Southwest. Meanwhile, for the purpose of having immediate rail service needed to develop the property, the development corporation entered into a letter agreement, dated June 4, 1957, with the Rock Island, in which the latter agreed to project its Dorothy spur south to the proposed point of connection with the district's lead track No. 1 on the northern boundary of the area. Rock Island further agreed to construct such other proposed lead tracks as the development corporation requested,

and, when completed, render service as the demands of the available traffic required. Under the agreement, Rock Island would not be required to construct any tracks considered as industrial tracks or sidings, and, in the event Great Southwest is certificated by us, it shall have the immediate right to purchase all facilities constructed by Rock Island within the district at cost, less accrued depreciation.

Subsequently, the development corporation, the Great Southwest, and the Texas & Pacific entered into an agreement, dated November 12, 1957, whereby the development corporation will donate a right-of-way easement over its property reasonably sufficient to build, and the Texas & Pacific will construct, at its own expense, a bridge across U. S. Highway 80 and tracks from the northern end of such bridge to a connection with the tracks of Great Southwest, as well as suitable and adequate interchange tracks. The agreement further provides that the service area served by Great Southwest shall be placed within the switching limits of the station "Great Southwest" to be established on the Texas & Pacific. Great Southwest shall publish on both intrastate and interstate traffic a terminal switching charge of $17.61 per car, augmented by any increases heretofore or hereafter prescribed or permitted by the Railroad Commission of Texas or by this Commission. It is further agreed that, in the event of the sale or lease of all or any portion of the line of railroad of Great Southwest or all or a portion of its capital stock by the development corporation, the Texas & Pacific and the Rock Island shall have an option, either jointly or severally, to lease or acquire such property or stock. A similar agreement, except for location of trackage, was executed with the Rock Island and is filed with the latter's supplemental application herein.

Except for trackage to be constructed by Rock Island as a result of the above-described letter agreement, Great

Southwest will construct the trackage within the industrial area. Construction will begin within 45 to 60 days after the receipt of the necessary authority from us, and it is expected that the trackage to be initially constructed can be completed within 4 months after the work is started. This trackage will consist of a single, standard-gage main line lead track of 90-pound rail and such secondary tracks as may be required. On the portion of the line to be acquired from the Rock Island there will be no complete wooden trestles, but there will be one 50-foot deck-plate girder bridge with wooden trestle approaches consisting of 3 panels on each end. The approximate length of each end is 42 feet and the height 25 feet. While it is not contemplated to construct the entire railroad at the outset, the cost of the trackage program as presently planned, consisting of 6.217 miles of main lead track and 4.814 miles of secondary track, with all necessary appurtenances including structures and roadway machines, is estimated to be $848,599. Total cost of equipment (rolling stock) which applicant considers necessary to conduct its operations is estimated to be $181,671.

Applicant estimates that traffic volume will total 5,532, 9,528, 13,512, 17,040, and 20,592 loaded cars inbound and outbound during the first 5 years of operation. System operating results for the same 5-year period are estimated as follows: Operating revenues (based on a switching charge of $18.49 per car) $102,287, $176,173, $249,837, $315,070, and $380,746; operating expenses $160,054, $160,054, $172,021, $179,677, and $193,822; and net railway operating income, $71,335 (deficit), $2,651, $64,081, $66,139, and $88,426 (profits).

As heretofore stated, Great Southwest seeks authority to issue not exceeding $1,200,000 of common capital stock, consisting of 12,000 shares of the par value of $100 each, to be

sold at par and the proceeds used to construct, acquire, and operate the above-mentioned line of railroad. These shares represent the entire capital stock of Great Southwest and have been subscribed in equal amounts by 10 individuals, each of whom is financially interested in or closely associated with the development corporation. When issued, all the stock except one share per person will either be held by the 10 individuals in trust for the development corporation or will be transferred to the latter.

The balance sheet of Great Southwest as of May 31, 1957, shows the following items: Cash $60,000, development cost $1,249, organization expense $750 and capital stock subscriptions payable $1,140,000, total assets $1,201,999; accounts payable $1,999, and capital stock, 12,000 shares authorized and subscribed at $100 per share, $1,200,000.

Rock Island seeks authority to extend its line by operating in interstate or foreign commerce approximately 1.79 miles of an existing track. No new construction and no additional expenditures are required. The line in question is composed of 2 segments, one of which has been in existence for many years and is known as "Dorothy Spur". The other segment was recently constructed to form the connecting link between the spur and the industrial district's lead track No. 1. If the authority requested by Great Southwest is granted, the line will be used to effect an interchange between the 2 carriers.

By its second supplemental application Texas & Pacific requests authority to construct a line of railroad connecting its main line with the line of Great Southwest, as specified in the agreement dated November 12, 1957. The line will extend from a turnout in its main line at milepost 231.26 in Arlington, overpass U. S. Highway 80, and connect with Great Southwest at a point within the southern boundary

of the industrial district, a distance of approximately 2,865 feet. All surveys, plans and specifications have been completed and construction was actually commenced on January 15, 1958. It is scheduled for completion on June 1, 1958. The trackage will be standard gage, consisting of 110- to 115-pound rail. No helper grades will be used and no wooden trestles, or other temporary construction, are contemplated. Cost of such construction is estimated to be $111,628 and will be entirely financed out of the treasury of Texas & Pacific. The traffic derived from the operation thereof will constitute net additional business and will not be diverted from existing railroads.

It is clear that construction, acquisition, and operation by Great Southwest will enable the development of the industrial area and that the industries and facilities locating therein will benefit from the service to be performed. It is also clear that the line to be constructed by the Texas & Pacific and the extension of existing trackage by the Rock Island are essential to the functioning of Great Southwest. However, the application should not be approved without restriction. We have held in numerous cases that the formation of independently operated lines to serve as feeders for existing carriers is not conducive to the creation of an efficient and economical transportation system. In some instances of this nature, applications have been approved upon the condition that applicant tender the railroad companies operating the connecting lines 10-year options under which the latter might acquire control of the applicant, or its properties, upon fair and reasonable terms, subject to our approval. See *Unity Rys. Co. Construction*, 247 I.C.C. 665, and cases cited therein. See also *Parr Term. R. Acquisition*, 275 I.C.C. 690. While the provisions in the contracts of November 12, 1957, with Texas & Pacific, and of February 20, 1958, with Rock Island, likewise grant op-

tions to the trunkline carriers to acquire or lease the property and stock of Great Southwest, they become effective only in the event that at some future date the owners of such property desire to lease or sell. As in the cases cited, we are of the opinion that the options should be immediate and unconditional. Under the circumstances, the instant application will be granted only upon the condition that, within 30 days from the effective date of our order herein, Great Southwest tender to the Rock Island and the Texas & Pacific a 10-year option under which those carriers may acquire joint and equal control of Great Southwest, or the purchase of its properties.

Subject to the above conditions we find that the present and future public convenience and necessity require (a) construction, acquisition, and operation by Great Southwest Railroad, Inc., of a line of railroad within the industrial district of the Great Southwest Corporation; (b) construction and operation by The Texas and Pacific Railway Company of a line of railroad extending from a connection with its main line at milepost 231.26 to a connection with Great Southwest Railroad, Inc., at a point near the southern boundary of the industrial district, and (c) operation by the Chicago, Rock Island and Pacific Railroad Company in interstate and foreign commerce of an existing interchange track extending from a connection with its main line near Dorothy to the point of connection with Great Southwest Railroad, Inc., at the northern boundary of the industrial district, all as described herein.

We further find that the proposed issue by the Great Southwest Railroad, Inc., of not exceeding 12,000 shares of common stock of the par value of $100 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance

by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate certificate and order will be issued which will provide that the construction shall be commenced on or before September 1, 1958, and be completed, at least insofar as the trackage of The Texas and Pacific Railway Company and the main lead track of Great Southwest Railroad, Inc., are concerned, on or before March 1, 1959. The certificate also will contain provisions with respect to the tender and filing of the option, the filing of tariffs, and the submission of journal entries.

Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 3rd day of June, A. D. 1958.

Finance Docket No. 19786

Great Southwest Railroad, Inc., et al.—Construction, Etc.

Finance Docket No. 19787

Great Southwest Railroad, Inc., Stock

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require (a) construction, acquisi-

tion, and operation by the Great Southwest Railroad, Inc., of a line of railroad within the property being developed by the Great Southwest Corporation as an industrial district; (b) construction and operation by The Texas and Pacific Railway Company of a line of railroad connecting its main line with the trackage of the Great Southwest Railroad, Inc., and (c) operation by the Chicago, Rock Island and Pacific Railroad Company, in interstate and foreign commerce, of an existing interchange track connecting its main line with the trackage of Great Southwest Railroad, Inc., all in Tarrant County, Tex., described in the report aforesaid: *Provided, however,* and this certificate is issued on the express condition, that within 30 days from the date of this order, the Great Southwest Railroad, Inc., shall tender to The Texas and Pacific Railway Company and the Chicago, Rock Island and Pacific Railroad Company a 10-year option under which those carriers may, at any time within that period, acquire joint and equal control or ownership of the railroad properties of Great Southwest Railroad, Inc., upon fair and reasonable terms, subject to the approval of this Commission, and *provided, further,* that construction shall be commenced on or before September 1, 1958, and be completed insofar as the main lead track of Great Southwest Railroad, Inc., and the trackage of The Texas and Pacific Railway Company are concerned, on or before March 1, 1959;

It is ordered, That the Great Southwest Railroad, Inc., and The Texas and Pacific Railway Company shall report, in writing, the commencement and the completion of the construction authorized herein within 15 days after such commencement and completion, respectively, and that the Great Southwest Railroad, Inc., furnish a copy of said option within 15 days after the date of its execution;

It is further ordered, That the Great Southwest Railroad, Inc., The Texas and Pacific Railway Company, and the Chicago, Rock Island and Pacific Railroad Company, when filing schedules establishing rates and charges applicable to said lines of railroad, shall in such schedules refer to this certificate by date and docket number;

It is further ordered, That the Great Southwest Railroad, Inc., be, and it is hereby, authorized to issue not exceeding 12,000 shares of common stock of the par value of $100 each;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged or otherwise disposed of by the Great Southwest Railroad, Inc., unless or until so ordered or approved by this Commission;

It is further ordered, That the Great Southwest Railroad, Inc., shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 56.4 and 56.6);

It is further ordered, That the Great Southwest Railroad, Inc., shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, division 4.

HAROLD D. McCOY
Secretary

(SEAL)

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 19922.

TOLEDO, PEORIA & WESTERN RAILROAD COMPANY ET. AL.
TRACKAGE RIGHTS, ACQUISITION, ETC.

Decided October 28, 1958

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1. Acquisition by the Toledo, Peoria & Western Railroad Company and the Chicago & North Western Railway Company of trackage rights over each other's tracks in the Peoria, Ill., area, approved and authorized. Conditions prescribed.

2. Certificate issued approving and authorizing operation by the aforesaid carriers of a connecting track in the Peoria, Ill., area.

3. Application in all other respects, dismissed.

Division 4, Commissioners Mitchell, Arpaia, and McPherson.

BY DIVISION 4:

No exceptions to the report proposed by the examiner were filed.

The Toledo, Peoria & Western Railroad Company and the Chicago and North Western Railway Company, common carriers by railroad subject to the provisions of Part I of the Interstate Commerce Act, referred to as the Toledo and the North Western, respectively, on September 9, 1957, filed a joint application, as amended, (1) under section 5 (2) of the act for authority (a) to the former to operate

under trackage rights over approximately 5.9 miles of main track of the latter extending through Sommer,[1] and (b) to the North Western to operate under trackage rights over approximately 4 miles of main track of the Toledo, extending from Sommer to a point west of Mapleton, and over 2.56 miles of track, partly completed, from Mapleton to Kingston Lake, and (2) under section 1 (18) of the act for approval of construction by applicants of a connecting track, about 519.8 feet in length, joining their main lines at Sommer, and for authority to operate thereon, all in the environs of Peoria, Ill., as more specifically described in the application and in exhibit 7 attached thereto and made a part thereof; or, in the alternative, for a finding that the proposed trackage rights exchange and the construction and operation of the connecting track are within the exemptions of section 1 (18)-(22) of the act and therefore not under our jurisdiction. No representations have been made by any State authority. The Central Illinois Light Company, the Olin Mathieson Chemical Corporation, The United Electric Coal Companies, the Truax Traer Coal Company, and Hollis Township, Peoria County, Ill., intervened in support of the application. The Peoria & Pekin Union Railroad Company, referred to as the Pekin Union, and the Minneapolis & St. Louis Railway Company[2] intervened

1. Extends from a North Western connection with track serving the Keystone Steel & Wire Company to the crossing of the Illinois River.

2. The purpose of its intervention was to state its position as to the application of a trackage-rights agreement relating to the operation by the North Western of coal trains over tracks of the former from Fulton County, Ill., coal mines to Iowa Junction in or near Peoria, but it does not appear that such an agreement has any material relevancy here.

in opposition, and the Keystone Steel & Wire Company as its interest might appear. A hearing was held on April 7-11, 1958, at Peoria, Ill. Briefs have been filed. Unless otherwise stated, all points hereinafter mentioned are in Illinois.

The Toledo operates in interstate commerce a main line of railroad extending from its eastern terminus at Effner on the Indiana-Illinois State line, through Peoria, to its western termini at Keokuk, Iowa, and Lomax, Ill. In *Toledo, P. & W. R. Co. Control,* 295 I.C.C. 523, decided May 31, 1957, acquisition by the Atchison, Topeka & Santa Fe Railway Company and the Pennsylvania Company of control of Toledo, through ownership of stock was authorized, but the transaction has not been consummated because of pending court litigation. The North Western operates in interstate commerce a line of railroad in Illinois and other States. The Central Illinois Light Company is an Illinois public utility engaged in generating and selling electricity in Peoria. The United Electric Coal Companies and the Truax Traer Coal Company are coal-mining companies operating in Illinois and other States. The Olin Mathieson Chemical Corporation is engaged in the operation of chemical plants, including one in the vicinity of Peoria. The Pekin Union[3] is a switching carrier in the Peoria switching district, handling interstate shipments. The Minneapolis & St. Louis operates in interstate commerce a line of railroad in Iowa, Illinois, and other States. The Keystone Steel & Wire Company

3. 38 percent of its stock is owned by the Illinois Central Railroad Company, the largest single stockholder, 12.5 percent by the North Western, and the remainder is owned by the Peoria & Eastern, the New York, Chicago & St. Louis, the Pennsylvania and the Chicago & Illinois Midland railroad companies.

is engaged in the manufacture of steel and steel products at its factory in Peoria, and Hollis Township, as its name implies, is a State municipality.

The exchange of trackage rights between applicants, involves no cash consideration. It is proposed to conduct such operations in accordance with an agreement, which covers also the construction and operation of the connecting track, entered into between applicants on July 25, 1957, subject to our approval of the application. Under the terms of the agreement, the parties grant to each other the right to operate trains upon each other's tracks and either or both parties have the right to serve all industries now located or to be thereafter located within the industrial area as outlined in the aforementioned exhibit 7 and hereafter referred to as the industrial area, either directly with its own power or through an operating arrangement with the other party upon such terms and conditions as may be agreed upon. The cost of construction and maintenance of the connecting track, which has already been constructed and operated, as hereinafter stated, will be at the sole expense of the Toledo, but each party at its sole expense will maintain the portion of its individually owned trackage. Other provisions relate to the construction of the industry track to Kingston Lake and other industrial tracks, and matters usually incorporated in trackage agreements not specifically mentioned herein. Either party has the right to terminate the agreement upon 6 months' notice in the event we permit it to abandon its portion of the trackage to be jointly operated, subject to an option to the other party to purchase such trackage. The agreement is to become effective as of the effective date of our order approving the application, and is to remain in full force and effect until otherwise terminated, as above stated. The connecting track

was constructed at a cost of $25,468 and was operated in interchange between applicants of through traffic, as well as traffic for delivery in the industrial area, from March 5, 1957 to about March 22, 1958, when operation was suspended pending outcome of this proceeding. The connecting track originally was constructed to serve industrial plants located or to be located on each party's industrial tracks as well as on jointly owned industrial trackage and as such was considered by applicants to fall within the exemption contained in section 1(22) of the act. After the connection was constructed, they decided also to use it as an interchange track for through carload traffic. The carriers proceeded upon the theory that such construction is a matter not within our jurisdiction. The application for our approval thereof was filed as a result of inquiry by our Bureau of Finance with respect to the matter after the application to acquire trackage rights was filed disclosing that a connection had been constructed without authority. The applicants now contend that both transactions are exempt either under the provisions of section 1 (18) or 1 (22) of the act.

Our jurisdiction in proceedings such as this one is well settled. *Alabama Ry.* v. *Jackson Ry.*, 271 U.S. 244. Furthermore, the proposal to serve industries on each other's lines appears in the nature of an invasion of territory of another carrier, no adjudication of the rights of the parties to serve each other's industries directly having ever been made. See *Texas & P. R. Co.* v. *Gulf, C & S. F. R. Co.*, 270 U.S. 266.

The principal purpose of the application is to enable both applicants to serve directly the entire industrial area, hereinafter described, without duplication of existing tracks, and to permit direct interchange of traffic be-

tween them instead of through the medium of the Pekin Union, as is the case at present.

The industrial area is immediately south of Peoria on the west side of the Illinois River. It is a long, narrow strip of land consisting of some 6,000 acres, zoned for heavy industrial use. The northern half of the area's western boundary is closely paralleled by a main line of the North Western, which crosses the area about midway, and the southern half by a main line of the Toledo, which proceeds to Peoria. The line of the former serves an industry in the northern portion of the area and the line of the latter serves industries in the southern portion. The Toledo owns property throughout the area. Lines of the Pekin Union and the Peoria Terminal Company extend also along the northern half of the western boundary.

The Keystone Steel & Wire Company, located 2 or 3 miles north of the Sommer interchange, and the Olin Mathieson Chemical Corporation, about 1.5 miles southwest of Sommer, are the principal industries in the industrial area. The former is one of the largest shippers in the Peoria area. Its steel mill, on the east side of the North Western main line, is served by the Pekin Union and the North Western and its wire mill, on the west side of the North Western line, is served by the Peoria Terminal and the Pekin Union. The plant ships about 50 or 60 carloads a month to Pacific coast and southwest points over various rail routes. The company's general traffic manager estimated a saving of one day in transit on such traffic, if direct interchange between applicants is permitted at Sommer and favors a direct interchange, but the witness did not know whether any of such traffic had moved over the interchange while in operation. The plant of Olin Mathieson, located on the line of the Toledo, was constructed in 1957 and was scheduled to commence opera-

tions on May 1, 1958. It was engaged in the handling of automotive products, such as anti-freeze. Its basic products are manufactured at plants in other States and will be shipped in by barge to storage tanks, which now contain 6 million gallons. The product is to be processed further at the plant where it will be packed or canned and distributed by truck or rail to automotive concerns. The company's assistant traffic manager estimated plant production for 1958 at 70,000 tons, of which probably 65 percent will move by truck and 35 percent by rail. About 90 percent of annual production is intended for shipment within a period of 4 months. The witness estimated a saving of one day in transit if the traffic is interchanged directly between applicants at the Sommer interchange. He does not expect the Pekin Union to participate in any of the plant's traffic because of the additional switching movement that would be involved. One of the factors in the selection of the plant site was the expected services from two rail carriers.

The United Electric Coal Companies maintain dock facilities at the southern boundary of the industrial area. The International Mineral & Chemical Corporation of Chicago is planning construction of a warehouse for storage of phosphate at Kingston Lake on the southern portion of the industrial area. The plant was designed for a capacity of about 3,500 tons. The inbound traffic is expected to move in by barge for distribution by rail. The company intends to furnish raw materials to fertilizer manufacturers in a large area. The company's director of transportation estimated plant distribution in the area at 400 carloads a year, and considers advantageous the direct service of the North Western, which would enable direct delivery of the plant's products to North Western points. A Peoria realtor, who is interested in industrial develop-

ment and has been instrumental in locating industries in the industrial area, considers that area most desirable for industries and is of the opinion that the area would develop more rapidly with services from two railroads. The manager of the Quaker Oats Company of Chicago[4] and others not specifically mentioned herein also expressed the opinion that the Sommer interchange would provide faster and more economical service than the service now available over the present route.

The Illinois Light Company, hereinafter referred to as the power company, generates electricity at its R. S. Wallace station in the East Peoria area and also at its Liberty Street station in Peoria, with capacities of 315,000 and 20,000 kilowatts, respectively. It supplies electricity and natural gas to 105 communities in the Peoria, Springfield, and Lacon areas, and furnishes steam heating to downtown areas in Peoria and Springfield. The territory served comprises roughly 2,586 square miles with a total population in excess of 446,000 inhabitants. In 1957, the company served 118,000 electric consumers, over 98,000 users of gas, and 926 steam-heat consumers. It is served exclusively by the Toledo either in switching or in both switching and line-haul services, depending upon the route of movement of the traffic.

The power company is now in the process of constructing in the industrial area an electric generating plant, referred to as the La Marsh plant, at an estimated cost of 26 million dollars, to be completed in 1960. The construction has been authorized by the Illinois Commerce Commission. The plant will be located on a 172-acre tract on the west side of the Illinois River adjacent to the con-

4. Shipped some 45 carloads a month through the Sommer interchange while in operation.

necting track at Sommer. Lines of the Peoria Terminal, the North Western, the Toledo, and an old right-of-way (crossing the North Western line) of the Pekin Union are located in the immediate vicinity of the proposed La Marsh plant. The applicants have partially completed industrial tracks[5] from the North Western line to the plant's proposed yard tracks. Construction of a switching track direct from the Toledo line to the plant requires crossing over the North Western line, and negotiations between the parties for such a crossing led to the execution of the trackage-rights agreement. Applicants do not concede that the Pekin Union has title to the old right-of-way referred to, but determination of that question is unnecessary in the disposition of this proceeding.

The new plant will be operated by steam power, using coal for fuel. Its initial unit will have a maximum capacity of 125,000 kilowatts. The company's vice president in charge of operations estimated the plant's coal consumption at 350,000 tons a year until such time as additional units are installed. The eventual capacity of the plant is expected to reach, sometime after 1970, one million kilowatts, which would require additional coal for its operation, and is expected eventually to supply approximately 50 percent of the company's total electricity generated at all its stations. The plant's output will be fed into the company's transmission system or neighboring utilities.

The supply of coal by rail for the operation of the La Marsh plant is to some extent dependent upon availability of services from two line-haul rail carriers and a coal rate

5. Construction of industrial tracks to serve plants within the industrial area is provided for in the trackage-rights agreement.

of 63 cents per ton, published from Fulton County coal mines, over the Toledo line. The rate from the same coal mines to the R. S. Wallace station is 92 cents per ton, which presumably would be applicable on shipments to the new plant over the present route in connection with the Pekin Union.[6] The United Electric Coal Companies operate 2 mines in Fulton County, located on the Toledo and the Chicago, Burlington & Quincy Railroad. In 1957, the coal company supplied the power company, for use at the latter's Peoria plants, 220,000 tons of coal, of which 90 percent moved over the Toledo and 10 percent on the Chicago, Burlington & Quincy line. The billing point for coal from the Toledo mine is Cuba, a point 29 miles from Sommer. The coal company expects to sell its coal to industries in the industrial area, particularly the new power plant, and, while there have been negotiations with the power company for coal purchases, no agreement has been signed. The Truax Traer Coal Company operates mines in Illinois, one of which is located at Fiatt on the Chicago, Burlington & Quincy, approximately 50 miles from Sommer, and the other, at St. David[7] on both the Toledo and the Chicago, Burlington & Quincy lines. The power company received at its Peoria plants from the coal company 225,000 tons of coal in 1957, of which 170,000 tons moved over the Toledo and the remainder on the

6. Application of this rate would increase transportation charges $101,500 a year, based on estimated traffic and such increase would ultimately be borne by the consumer under a fuel-cost adjustment on file with the Illinois Commerce Commission. In the case of the largest customers, estimated increases would range from $1,200 to $23,000, but the increase in the case of each residential consumer would be negligible.

7. The billing point is some 24 miles from Sommer.

Chicago, Burlington & Quincy. This coal company also expects to furnish a substantial volume of the coal tonnage for the operation of the new power plant, but it has no definite commitments.

Officials of the power company are determined to obtain the services of both the North Western and the Toledo, as well as the benefit of the rate of 63 cents a ton on coal over the Toledo line. They are definitely opposed to the coal traffic moving over the Pekin Union because of the higher rate applicable over that route. If unable to attain their objective, they propose to make arrangements for the receipt of the coal by water or truck at a rate comparable to the 63-cent rail rate.

The North Western is to Peoria a north-south carrier. It has a main line between Chicago and St. Louis, Mo., passing west of Peoria through a point known as Kickapoo Junction, thence through Sommer and across the Illinois River through South Pekin, where it maintains a classification yard. Peoria proper is served by the North Western over a track diverging from the main line at Kickapoo Junction to the North Western's Adams Street yard, a distance of about 1.9 miles. Under schedules effective in January 1958, the North Western operates 3 trains daily in each direction, 2 of which are high-speed and the other is on a slow-speed schedule. The slow-speed southbound train arrives at the Adams Street yard at 9:30 p.m.; and the 2 high-speed southbound trains arrive at the South Pekin yard at 6 a.m. and 6 p.m. On the northbound run, the slow-speed train departs from the Adams Street yard at 3:45 a.m.,[8] and the 2 high-speed trains depart from the South Pekin yard at 6:45 a.m.[9]

8. Originates at South Pekin.

9. Departs from Madison, Ill. (E. St. Louis), at 1 a.m.

and 7:30 p.m.,[10] respectively. The high-speed trains are not scheduled to stop at the Adams Street yard and the only regular outbound train available at that point is the slow-speed train. On the southbound traffic the slow-speed train terminates at South Pekin. All southbound traffic destined to Peoria proper or for interchange with the Toledo is delivered at the Adams Street yard. Such traffic is either held en route at Nelson, which is a junction point on the North Western's Chicago-Omaha line about 80 miles north of Peoria, awaiting the slow train, or is sometimes moved by the high-speed trains all the way to the South Pekin yard to be later returned to the Adams Street yard.

The Toledo is to Peoria an east-west line. It operates from its western termini over its own line to a point known as Hollis, which is located a few hundred feet north of the connecting track at Sommer, thence under trackage rights,[11] for a distance of approximately 7.5 miles, over lines of the Peoria Terminal and the Chicago, Burlington & Quincy to a connection with its own track near the west end of its Illinois River bridge in Peoria, proceeding over its own track for a distance of 2 or 3 miles to its classification yard, known as the Farmdale yard in East Peoria, where the Pekin Union delivers interchange traffic to the Toledo. The remainder of the Toledo main line extends from the Farmdale yard to the carrier's eastern terminus of Effner. The Toledo operates eastward 3 trains arriving at Peoria at 8:40 a.m. and 9:57 p.m. daily, and 9:25 a.m. triweekly, and 3 daily trains departing at 2 a.m., 12:01 p.m., and 6 a.m. On the westward run 3 daily trains

10. Departs from Madison, Ill., at 1:30 p.m.

11. Operates over 686 feet of its own track which connects the Peoria Terminal and Chicago, Burlington & Quincy segments.

arrive at Peoria at 10:48 a.m., 6:48 p.m., and 10:33 p.m., and 3 trains depart at 6 a.m. triweekly, and 1 p.m. and 9:30 p.m. daily.

The line of the Pekin Union, consisting of approximately 145 miles of switching tracks, extends generally from Pekin on the east side of the Illinois River to its East Peoria yard, which has a capacity of 2,000 cars, thence westerly across the river, and southerly to the end of the line at a point about 2 miles north of Sommer. Of the 14 railroad lines entering Peoria, 7 are tenant lines of the Pekin Union. All road trains of the tenant lines, except the North Western, terminate at the Pekin Union East Peoria yard. The Pekin Union performs all deliveries or switching within the Peoria switching district for the tenant lines and operates for the North Western the Adams Street yard, where its line connects with that carrier's line. It serves 94 industries in the Peoria area, of which 84 are served exclusively, in addition to 47 other industries located on its team tracks.

The interchange of traffic between applicants at Peoria is effected by a switching movement, performed by the Pekin Union, from the Adams Street yard to the Toledo's East Peoria yard, a distance of approximately 5.4 miles, passing through the switching carrier's 90-91 yard and its East Peoria yard. Traffic in the opposite direction is switched from the Pekin Union East Peoria yard, where such traffic is received from the Toledo, to the Adams Street yard. The switching services performed by the Pekin Union for the North Western include the segregation of North Western's cars from its own trains as well as from Toledo trains, all of which entails considerable switching, as shown by exhibits received in evidence indicating train position of cars when received by the Pekin Union. The switching of the traffic by the Pekin Union

involves one classification at the East Peoria yard and another at the Adams Street yard and might involve still another at the 90-91 yard. In order to make morning delivery to Peoria industries, the Pekin Union prefers receiving cars from its connecting railroads by 1 p. m., or not later than 6 p. m. of the preceding day, depending upon the industry. The Pekin Union switches to the Toledo yard twice a day and receives traffic from the latter only once a day. The former arranges its operations to make connection with the 3:45 a. m. North Western train out of Peoria.

Carload traffic interchanged in the Peoria area between applicants for the 4 years 1954-57 amounted, in order, to 3,911, 5,165, 4,486, and 4,603. Traffic interchanged in 1957 between the Toledo and all other carriers in the Peoria area was 73,193 carloads, of which 4,603,[12] as stated, was traffic interchanged with the North Western and the remainder with other carriers. The preponderance of traffic interchanged between these two carriers generally moves into Peoria from the north on the North Western and out of Peoria to the east on the Toledo and in the reverse direction.

As heretofore stated, applicants propose to substitute direct interchange of traffic between them at Sommer, in lieu of the switching provided by the Pekin Union, and to operate over each other's tracks. A direct line-haul movement would be available to either the North Western or the Toledo through the Sommer interchange to or from all industries in the industrial area located on applicants'

12. 3,544 carloads were interchanged directly at the Sommer connection and 1,059 through the Pekin Union, the Sommer interchange having been in operation in 1957 from March to December.

lines. Under the present route, however, the handling of such traffic, requiring an interchange between applicants, involves an additional movement by the Pekin Union for distances ranging from approximately 12 to 24 miles, depending upon the location of the industry and the origin or destination of the traffic. In the interchange of overhead traffic, the distance on shipments moving (1) southbound North Western to Peoria and the Toledo westbound is approximately 12.3 miles longer over the Pekin Union than via the Sommer interchange (2) northbound North Western to Peoria and the Toledo westbound approximately 23.9 miles longer (3) northbound North Western to Peoria and the Toledo eastbound approximately 2.3 miles and (4) southbound North Western to Peoria and the Toledo eastbound approximately 9.3 miles shorter.[13] The mileage situation is the same on traffic moving in the reverse directions.

The applicants' principal contentions are that direct interchange at Sommer would expedite adequate handling of the interchange traffic at substantial savings in switching charges; that services from two line-haul carriers would accelerate development of the industrial area; that it would be uneconomical for each applicant to serve the entire area with its own tracks; that the proposal would be to the advantage of every industry in the industrial area, as each would have access to a double supply of cars in time of equipment shortage, prompt plant switching,

13. The approximate mileage between Sommer and Kickapoo Junction is 5.8 miles, Kickapoo Junction and Adams Street yard 1.9 miles, Sommer and Adams Street yard over the Toledo line 5.2 miles. Adams Street yard and Toledo's East Peoria yard over the Toledo line 5.6 miles, and between the Toledo's East Peoria yard and the Adams Street yard via the Pekin Union's East Peoria yard, 5.4 miles.

fast interchange without intermediate switching, and immediate road-haul service in all directions; and that approval of the proposal would enable applicants to handle the coal traffic for the power company at lower coal rates.

Based on studies conducted by applicants, the time consumed in the interchange of cars between applicants through the Pekin Union during the period February 15-28, 1957, on traffic delivered to the North Western (from time of delivery to Pekin Union to time of departure on the North Western), ranged from about 17 to 45 hours, or an average of approximately 19 hours, and on traffic delivered to the Toledo (from time of receipt by Pekin Union to time of delivery to Toledo) from about 2 to 53 hours, or an average of 26 hours, as compared to time consumed at the Sommer interchange for a like period in 1958 of 2.5 to 26 hours, or an average of 8 hours per car, on traffic delivered to the North Western,[14] and from about 2 to 41 hours, or an average of 12 hours per car, on traffic delivered to the Toledo.[15] Overhead traffic left at Sommer for the connecting carrier might require classification for the line-haul movement. Traffic delivered to the North Western would undoubtedly be hauled to the South Pekin yard for that purpose and Toledo cars to the East Peoria yard unless such cars are connected to through trains at Sommer, as might be the case on traffic from the south on the North Western for a westward movement on the Toledo. Applicants' studies do not seem to cover time consumed on a complete line haul to line-haul movement. This is also true of studies of the Pekin Union, as hereinafter stated.

14. Does not account for time consumed at Toledo's East Peoria yard on westbound traffic.

15. Does not account for time consumed at Toledo's East Peoria yard on eastbound traffic.

Opposition to the application on the part of the Pekin Union rests principally on the grounds that applicants' proposal would not result in expedited and economical service, as alleged, but rather in an unnecessary and wasteful duplication of an existing adequate service, that Pekin Union is willing and able to effect connections adequately and efficiently between applicants' lines at Peoria on a basis as favorable as that envisioned at the Sommer exchange, and that approval of the application would result in loss of gross revenues estimated at $43,020 a year.

Periodic checks conducted by Pekin Union employees on traffic interchanged at Sommer for the 3 periods in 1957, September 20 through October 2, October 16 through October 25, and November 11 through December 10, and for the 1 period in 1958, February 10 through February 19, indicate that cars remained at the interchange for each of the periods stated, in order, from approximately 4 to 28 hours, 3 to 87 hours, 3 to 52 hours,[16] and 3 to 33 hours. The check consisted of an inspection of the interchange from nearby points at intervals of 5 or 6 hours and the recording of car numbers and time. It does not reveal whether the cars were loaded or empty nor the point of destination. The time recorded was between checks and does not include time before or after the first and last checks. The exhibit does not reflect cars that might have arrived at and departed from the interchange between checks. Other similar checks for 2 periods of continuous checking in 1958, from 12:01 a.m., March 11, to 11:59 p.m., March 13, and from March 18-20 show that cars set out at Sommer by the Toledo for the North

16. Of a total of 256 carloads checked during the 30-day period, only 11 cars were detained more than 19 hours and the remainder from 3 to 19 hours.

Western remained at the interchange track an average for each period of 15.2 and 6.5 hours per car and on cars set out by the North Western for the Toledo an average of 6.9 and 13.1 hours per car. Most of the traffic set out was left at the interchange from 10 to 18 hours by the North Western and from 8 to 20 hours by the Toledo. These checks do not show what additional handling, if any, was furnished before the traffic started on its line-haul journey.

Other studies by the Pekin Union disclose that during the period March 22 to April 3, 1958, the time consumed by the Pekin Union to effect interchange between applicants on all carload traffic handled ranged from about 1 to approximately 23 hours, or an average of 6 hours and 52 minutes,[17] on deliveries from the Toledo to the North Western and from 7 to 16 hours, or an average of 10 hours 40 minutes, on deliveries from the North Western to the Toledo. Deliveries to the North Western by the Pekin Union were in most cases made in ample time to connect with the North Western train departing at 3:48 a.m.

The present routing on applicant's traffic originating or terminating in the industrial area on an industry located on the line other than the line-haul carrier, is via the Pekin Union, as stated. The interchange of such traffic involves a substantial additional haul. In case of the inbound movement such haul takes place after arrival at point of destination and in some cases on outbound movement before commencement of the main-line haul movement. Coal shipments to the La Marsh power plant, for example, over the Toledo line would involve,

17. Train departures after delivery to the North Western were from 3 to about 22 hours later.

after arrival at Sommer a total additional haul of some 21 miles, including the switching movement of the Pekin Union. Therefore, as to all traffic to or from industries in the industrial area requiring interchange between applicants, use of the Pekin Union for interchange in preference to the direct interchange at Sommer constitutes wasteful and inadequate transportation and is unwarranted. In connection with all such traffic applicants will be permitted to interchange at Sommer.

A somewhat similar situation exists with respect to the overhead traffic interchanged between applicants at Peoria through the medium of the Pekin Union, except as to North Western's traffic from the north for movement by the Toledo to the east, or in the reverse direction. The excepted traffic involves the equivalent of a back-haul movement when interchanged at Sommer.

The studies conducted by the parties on time consumed in effecting interchange of traffic at both interchange points is of doubtful use for comparative purposes, as the overall time consumed in the switching of the overhead traffic from time of arrival on the line-haul carrier to time of departure is not shown. However, it is of minor importance whether the Pekin Union conducts its switching in a short or a long period, if such traffic in either event is delayed several additional hours awaiting departure of the line-haul train, as disclosed in such studies. In most cases the Pekin Union delivers to the North Western in time for departure of the 3:45 a.m. train from the Adams Street yard, the only out-bound North Western train available daily at that point, and it is willing and able to meet schedules of North Western fast trains if they would stop at the Adams Street yard, which ordinarily is not the case. The Pekin Union has no control of the traffic until it is received from the connecting carrier, and

it is not primarily responsible for any delays encountered in the switching of the traffic. Such delays are due principally to time schedules of connecting carriers, which are unable or unwilling to change them because it is not to their best interests. If the North Western were to change its time schedules to provide for stops at the Adams Street yard of its fast trains, as suggested by the Pekin Union, it would not altogether eliminate delays, as the carrier would still be confronted with some delay in the switching of trains from the main line at Kickapoo Junction in and out of the Adams Street yard. The delay at the Sommer interchange would be comparatively shorter. Since the expedited handling of the traffic depends upon the arrangement of time schedules by the connecting carriers, we cannot conclude upon this record that applicants could handle or have handled the bridge traffic more expeditiously over the Sommer interchange.

North Western traffic into Peoria from the south for an eastbound or westbound movement on the Toledo, or in the reverse directions, involves a switching haul on the eastbound movement of approximately 10.8 miles if interchanged at Sommer, as compared to 13.1 miles when interchanged through the Pekin Union, and on the westbound movement no additional haul[18] is encountered through the Sommer exchange, while the interchange via the Pekin Union would involve a haul of some 24 miles. The difference in mileage between the two routes on the eastbound movement is not substantial, but the Toledo

18. Based on assumption that cars would be connected at Sommer to a westbound Toledo train, otherwise such cars probably would be hauled by an eastbound train to the Toledo's East Peoria yard for classification and movement on the next westbound train.

has its own direct line from Sommer to Peoria and no back-haul or out-of-route movement is involved. North Western traffic into Peoria from the north for an eastbound movement over the Toledo or in the reverse direction would move over an indirect or out-of-line route 16.6 miles,[19] if interchanged at Sommer, as compared to 7.3 miles over a direct route of the Pekin Union. The interchange of such traffic at Sommer requires a movement beyond Peoria to Sommer, then back to Peoria. In our opinion, use of the Pekin Union for the interchange of the overhead traffic between applicants is unwarranted because of the additional hauls involved or the direction of the movement of the traffic and the additional switching required, except in the case of North Western traffic moving into Peoria from the north for delivery to the Toledo for an eastbound movement, or in the reverse direction. The excepted traffic should continue to move through the Pekin Union. Such handling will impose no additional burden on the North Western, as it will continue to deliver and originate traffic for other carriers at its Adams Street yard.

Some gross revenue losses will be sustained by the Pekin Union but not as large as anticipated, as it will retain the predominant flow of present traffic, which moves from the north over the North Western to Peoria, thence east over the Toledo or in the reverse direction. The loss was estimated on the basis of 4,486 carloads interchanged in 1956. Calculations made by the Toledo's vice president and comptroller as to the net effect of such loss, based on the 1957 annual income account of Pekin Union, show a decrease in net income of $9,246, giving effect to decreases in transportation expenses

19. Mileage based on Kickapoo Junction.

on basis of the 1957 ratio of expenses to revenues with certain income-tax adjustments, or a decrease of $19,200 if no allowance is made for decreases in transportation expenses but only for tax adjustments, or a decrease of over 11 percent in net income.[20] The Pekin Union disagreed with such computations but made no calculation of its own.

There is a track connection between lines of the Pekin Union and the Peoria Terminal at Wolschlog,[21] where the latter maintains yard facilities. The Toledo, as heretofore stated, operates under trackage rights over the Peoria Terminal line through or near Wolschlog. A witness for the Pekin Union suggested that his railroad perform the switching to and from the power company plant over this connection, thence over a proposed extension of track to the plant, but he did not know whether existing contracts would permit interchange of traffic with the Toledo at that point. The Pekin Union also contends that the interchange of traffic at Sommer would be in violation of its agreement, dated December 1, 1911, as later supplemented, a copy of which was received in evidence, with the North Western or its predecessor providing for switching by the former of the latter's traffic in the Peoria area.[22] Construction of the agreement is now pending in the U. S. District Court for Illinois. However, the agreement is not of controlling importance in the disposition of this proceeding.

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20. 1957 net income was $174,035.

21. A point close to the end of the Pekin Union Track near Hollis.

22. The North Western and the Toledo have recently amended the tariff to exclude their tracks in the Sommer area from the Peoria switching district.

Based upon the facts and law, we arrive at the following major findings:

1. That this proceeding is within our jurisdiction.

2. That switching by the Pekin Union of traffic now interchanged between applicants at Peoria, originating or terminating in the industrial area, is inadequate, wasteful, and unnecessary transportation and results in undue delays.

3. That industrial-area traffic could be handled more expeditiously and efficiently, and without undue delay through the Sommer interchange.

4. That use of the Sommer connecting track and proposed trackage-rights operation would afford applicants an opportunity to handle the La Marsh plant's coal traffic, which they might otherwise lose to truck or water-carrier competitors.

5. That approval of the application with respect to the handling of traffic to or from the industrial area on applicants' lines would eliminate duplication of rail facilities.

6. That switching by the Pekin Union of applicants' bridge traffic, interchanged at Peoria, is also wasteful and unnecessary transportation, except as noted below.

7. That interchange between applicants at Sommer of bridge or overhead traffic arriving into Peoria on the North Western from the north for delivery to the Toledo for an eastbound movement, or in the reverse direction, requires a roundabout or indirect haul, which is unnecessary and unwarranted.

8. That the Pekin Union provides a direct route for handling the traffic referred to in No. 7 above.

9. That Pekin Union is unable to provide as efficient and economical service, except in the instance noted, as that available to applicants over the Sommer interchange.

10. That under the findings herein no substantial traffic losses would be sustained by Pekin Union.

The proposed transaction would provide adequate transportation service to the public. The exclusion of other railroads in the territory involved would be in the public interest. The transaction would not result in any increase of total fixed charges nor the guaranty or assumption of payment of dividends or fixed charges. It does not appear that the interest of carrier employees would be adversely affected. However, our authorization and approval herein will be granted upon the same conditions for the protection of railway employees as those prescribed in *Chicago & N. W. Ry. Co. Merger*, 261 I. C. C. 672.

Subject to the conditions above referred to for protection of railway employees and the further condition that applicants continue to interchange through the medium of the Pekin Union all bridge traffic moving into Peoria from the north over the North Western for an eastbound line-haul movement over the Toledo, or in the reverse direction, we find (1) that acquisition of trackage rights by the Toledo, Peoria & Western Railroad Company and the Chicago and North Western Railway Company over the tracks of each other in the Peoria area, as described herein, is a transaction within the meaning of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions prescribed are just and reasonable, and that the transaction will be consistent wih the public interest, and (2) that the present and future public convenience and necessity require operation of the connecting

track at Sommer, described herein and except to the extent herein granted the application will be dismissed.

An appropriate certificate and order will be entered.

Arpaia, Commissioner, being necessarily absent, did not participate in the disposition of this proceeding.

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No. 21

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In the

Supreme Court of the United States

October Term, 1964.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District of Wisconsin.

PETITION FOR REHEARING.

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The Schaffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 21

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District of Wisconsin.

PETITION FOR REHEARING.

Now comes the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company, Appellees herein, and respectfully pray the Court to grant a rehearing in this cause.

I.

The Court's Judgment, Based on the Texas Case, that Republic Junction Is an "Extension" of a Line of Railroad Conflicts With Its Order in No. 857 (O. T. 1964) Denying Review of a Decision that the Texas Doctrine Does Not Apply to Railroad Operations into New Territory Over a New Track Which Divert Traffic From Another Railroad.

After hearing argument on the merits in this cause, the Court without opinion entered its *per curiam*, one sentence

judgment reversing the decision of the three-Judge court below (R. 384, 393). The Court supported its judgment by citing *Texas & Pac. Ry. Co.* v. *Gulf, Etc., Ry.*, 270 U. S. 266, 278 (1926), which held that new or proposed "spur, industrial, team, switching or side tracks", although normally exempt under § 1(22) of the Interstate Commerce Act[1] from the requirements of § 1(18) of the Act,[2] nevertheless could constitute an "extension of a line of railroad" requiring the Commission's § 1(18) approval in the event such new trackage enabled a railroad to institute service in a "new territory" and thereby to divert traffic from other railroads already serving the area. The import of this citation is that the 262 foot Republic Junction connection between the adjacent lines of the Milwaukee and Ishpeming is an extension of their respective railroads because it permits them to operate into territories not theretofore served by them and to divert traffic from Appellant, Chicago and North Western Railway, thus, in the sense of the *Texas* case, enabling Appellees to "invade" areas already served by the North Western.

We cannot reconcile this judgment with the Court's order in *New York Central Railroad Co.* v. *Southern Railway Co.*, No. 887, this Term, entered March 29, 1965, only a week before the judgment in this case. In that case the Court denied a petition for a writ of certiorari and thereby let stand the decision of the Court of Appeals, 338 F.2d 667 (C. A. 7, 1964), affirming *per curiam* the opinion of the District Court, 226 F. Supp. 463 (N. D. Ill., 1964), that the Southern Railway's operation over a new 10.5 mile track to a coal mine located only 350 feet from a branch line of the New York Central was not a § 1(18) extension

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[1] Sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U. S. C. § 1 (22).

[2] *Ibid.*, 41 Stat. 477, 49 U. S. C. §1(18), as amended.

of railroad line and did not "invade" territory previously served by the Central. The Southern theretofore had not served the locale of the mine. On the contrary, as the Commission observed in 1938 when it granted the Central a § 1(18) certificate to construct its branch line, no railroad other than the Central served the territory. *Cleveland, C., C. & St. L. Ry. Co. Construction & Operation*, 228 I.C.C. 461, 462 (1938).

The Central relied principally on the *Texas* decision to support its right to an injunction under § 1(20) of the Act, 226 F. Supp. 467-468. But the district court, at pages 473-474, rejected the very theory which underlies the Court's judgment in this case.

Because of its insignificant length and the switching operations conducted over it, Republic Junction would be within § 1(22) of the Act and exempt from the Commission's § 1(18) power to regulate, except for the Court's interpretation of the *Texas* decision. The Court's adjudication suggests in this litigation that the *Texas* rule applies only because the connection permits Appellees to divert traffic from another railroad by their entry thereover into new territory. But the result in No. 887 is wholly contrary to that reached herein in that diversion of traffic from another railroad was there held not to come within the *Texas* doctrine despite the fact that the Southern's undertaking constituted a significant incursion into new territory, which Republic Junction does not.

In this case a short track goes nowhere and the Court calls it an "extension of a line of railroad"; but in No. 887 a much longer track goes to an important shipper and is held to be exempt from § 1(18). The logic of this anomaly escapes us. The result in each case is more appropriate to the track in the other.

The law should not be ambiguous on this point, and these conflicting applications of the *Texas* case should not remain unresolved, in view of the importance to the nation's railroads and rail shippers of a consistent interpretation of §§ 1(18)-1(22) of the Interstate Commerce Act. Spur, industrial, team and switching tracks for picking up and delivering rail cars to shippers and for interchanging them between railroads are essential to the furnishing of adequate railroad transportation to the public. As Congress recognized by enacting § 1(22), every railroad must routinely construct new tracks of such types, and add to and rearrange old, in order to keep pace with the new and changing requirements of the shipping public.

The Milwaukee, for example, during 1964 initiated 103 different projects to build such tracks. No less than 17 of them involved service to a shipper already served, or to be served, by another railroad as well as by the Milwaukee.[2] In at least those 17 projects, and in many of the others also, the Milwaukee's improved or new facilities may uniquely benefit a shipper so that his traffic is attracted to the Milwaukee in preference to another carrier. Many of the 103 projects are designed to serve new shippers never before served by the Milwaukee or, perhaps, by any railroad. Counsel has no reason to believe the other 140 Class I railroads of the Country annually build proportionally fewer such tracks.

Any construction of such necessary trackage could easily run afoul the rule of the *Texas* decision and subject both shippers and railroads to the uncertainties, delay and expense of seeking administrative approval of projects whose legality, otherwise, is made doubtful by the

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[2] This data is from records in the office of the Milwaukee's Auditor of Capital Expenditure authorizing funds for the construction of such trackage.

presently ill-defined scope of the terms "new territory" and diversion of traffic by means of "invasion". At a time when the future vitality of the Nation's railroad systems depends upon new traffic from new shippers and improved facilities to serve old shippers, the Court should leave no uncertainty in the law as to whether, without Commission approval, every track construction to serve a new shipper or every diversion of traffic from existing carriers is proscribed by the *Texas* case.

II.

Contrary to the Court's Judgment Herein, the Texas Case Cannot Apply to Republic Junction Because the Track Permits No Service to New Territory or New Shippers, and It Causes No Traffic Diversion From Other Carriers Which Would Not Have Occurred in the Absence of the Connection.

The facts in this litigation make clear that in the vicinity of Republic Junction the connection causes nothing which the *Texas* case condemns in the absence of Commission approval. The 262 foot track itself cannot extend into new territory because it lies entirely within the adjoining rights of way of the Milwaukee and Ishpeming (R. 99, 385). No shipper can be served directly from it (Applicants' Ex. 3; R. 228, 114, 389). Nor can the connecting track "invade" any territory served by the North Western or Soo Line whose tracks nearest Republic Junction are 9 and 6 miles, respectively, away from it (Applicants' Ex. 2, R. 226, 114). No traffic originates in the immediate area of the connection, as occurred in *Texas & Pac. Ry.* v. *Gulf. Etc., Ry.*, 270 U. S. 266, 276 (1926). The track makes possible only a new through route, no coordination or merger of Appellees' operations.

The connection enables neither the Milwaukee nor the Ishpeming to extend their railroads into new territory

not previously served by them (R. 101). The record shows that the traffic over Republic Junction consisted preponderantly of saw logs and chemical wood moving from Sunrise Landing to Amasa and Iron Mountain, Michigan (R. 299-301). The Milwaukee has served these destination cities, and its right of way has been at what is now Republic Junction, since it commenced serving the Upper Peninsula many years ago (R. 300, 301, 390, 400). These products have not moved via the connection to any shipper who did not receive them before Republic Junction was built (R. 101).

The Ishpeming has operated its railroad in the area of Republic Junction since it commenced serving the town of Republic two miles south of the connection (R. 259-262). It is the only railroad ever to serve Sunrise Landing (R. 391); the North Western and Soo Line do not operate to that point. Its branch line was built there to meet the demand of newly instituted logging operations (R. 301) and with the § 1(18) authorization of the Commission. *Lake Superior & Ishpeming Railroad Company Construction*, 295 I. C. C. 812 (1956).[4] When the connection was built, Sunrise Landing was not "new territory" for the Ishpeming.

This litigation ought not turn, therefore, upon the *Texas* case ruling that a railroad track constructed into new territory is within the ambit § 1(18) of the Interstate Commerce Act so as to require Commission approval of the undertaking. On this ground the Court's judgment in this cause does not comport with the facts of record herein.

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[4] The decision of the Commission is not reported in full here. It was entered in Finance Docket 19084.

It is true, however, that prior to Republic Junction, lumber products moved from origins on the Ishpeming to Amasa and Iron Mountain via the present Soo Line in conjunction with the Milwaukee or via the North Western (R. 301, 389). But prior to the Ishpeming's extension to Sunrise Landing, those origins did not include Sunrise Landing. Traffic cannot be "diverted" from a carrier which has never moved it.

Any diversion of traffic from Sunrise Landing purportedly caused by the connection similarly would have occurred if the tracks had never been built. The record is emphatic that the rail transportation costs via the present Soo Line and the North Western would have been prohibitively high (R. 126-130) and that the lumber products from Sunrise Landing would have moved by motor truck in preference to any rail route in the absence of Republic Junction (R. 128-129, 156-157, 173). Inevitably without the connection, the traffic would have been diverted from both the North Western and Soo Line, but to motor trucks instead of to Appellees' railroads. Appellant and the Soo Line thus would now be no better off without Republic Junction than with it. Either way, they would have lost the traffic.

This is markedly different from the diversion through invasion situation adjudicated in the *Texas* case. Republic Junction does not permit either the Milwaukee or the Ishpeming to divert traffic from other railroads or to invade their territory within the rule of that decision. The *Texas* case cannot accord with the facts here in issue, and the Court should decline to be guided by it in this litigation.

III.

CONCLUSION.

For the foregoing reasons this Petition for Rehearing should be granted, and this case should be set down for reargument.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, one of the attorneys for Appellees in this cause, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Frank M. Long

CERTIFICATE OF SERVICE.

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois, this 19th day of April, 1965.

Frank M. Long